THE JUDGMENT OF CONSTITUTIONAL MORALITY

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A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfillment of the Requirements

for the Degree Master of Arts

McMaster University

MASTER OF ARTS (2008) McMaster University
(Philosophy) Hamilton, Ontario

TITLE: The Judgment of Constitutional Morality

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NUMBER OF PAGES: vii, 85

ABSTRACT

This thesis examines a novel claim that judicial review of legislation is democratically justified because judges can have access to their community's constitutional morality and base their judgments on those grounds. A constitutional morality is a complex intersubjective agreement where citizens have agreed to entrench certain rights in law. It is often claimed both in preambles and in theoretical defenses that constitutions are represent the true will of the people. In liberal democracies, constitutions contain provisions wherein certain rights of citizens are recognized. The legal systems of liberal democracies typically make constitutional courts the final arbiters of the meaning of these moral provisions. Judges are unelected officials and thus any defense of their decisions as being democratic must be indirect and rely on a theory of interpretation. Jeremy Waldron has recently argued that the contents of rights provisions are subject to reasonable disagreement; judges are not adequately guided by constitutional language and thus enforce their own subjective reading of rights provisions. Waldron argues that the practice of constitutional courts disrespects citizens and undermines their participatory rights; majoritarian institutions like legislatures grant greater respect to reasonable disagreement and participatory rights central to democracy, thus it is better to settle rights disputes in that venue. In this thesis, I attempt to rebut Waldron's claims by extending Waluchow's analysis of a community's constitutional morality. The first chapter demonstrates how Waluchow provides a superior response to Waldron's critique than either the 'moral reading' theory of Ronald Dworkin or originalism. The second chapter aims to show that a constitutional morality is plausible meta-ethical description of constitutional practice and an empirically defensible concept, but it remains outside reliable judicial knowledge in common law systems. In the final chapter, I argue that even if judges could know a constitutional morality it would not provide adequate guidance since it is likely to contain indeterminate or conflicting norms. I conclude by arguing that despite their inability to represent constitutional moralities perfectly, constitutional courts may do a better and more efficient job than legislatures.

ACKNOWLEDGMENTS

First, I must acknowledge my debt to my supervisor, Dr. Wil Waluchow. His generosity and patience during the writing of this document was crucial to its completion. I have learned a great deal from him. Much thanks goes to my second and third readers, Drs. Violetta Igneski and Elisabeth Gedge for their support, incisive commentary and editorial assistance made under short notice. I have also been fortunate to be surrounded by the many great students of legal philosophy at McMaster. The seemingly constant opportunities to 'talk shop' have provided a great working environment. Thanks to the Social Sciences and Humanities Research Council of Canada for their generous financial support that was essential to my completion. I'd be remiss if I didn't mention the credit my parents deserve for the support they've provided me lo' these many years. Finally, I would also like to thank my many friends and colleagues with whom I discussed any issue falling under the broad umbrella of constitutionalism. On this front, I'd like single out Frank Jankunis and David Rondel and thank them for their relentless inquisitions and attempts to make me state my claims more clearly. Of course, any errors that remain in this document are my responsibility.

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> No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.
>
> - Alexander Hamilton, Federalist No. 78

Introduction

Justifications of judiciaries vary since they depend on the character of the institution within different types of legal systems and the scope of judicial powers within a given system. Confronted with a hypothetical minimal state scenario, many find it intuitively desirable for an impartial authority to settle a property dispute between two parties. The disputants can agree to abide by the authority's terms and avoid the potential non-compliance of the other party, or even a physical conflict, that might result if they tried to settle the dispute themselves. By contrast, defending the compatibility of judicial review and democracy in constitutional democracies is a far more difficult task wherein intuitions, or gut feelings, aren't dispositive. Courts are still a forum for non-violent dispute resolution, but the prudential values of avoiding harm or non-compliance are not the only ones in play. Some rationales are easier for the institution to meet than others.

A democratic community is one where the people are ultimately responsible for the laws by which their lives are governed. Many constitutions, however, allow or call for judges to be the final authority on what the law is. Judicial review is the "practice whereby courts are sometimes called upon to review a law or some other official act of government to determine its constitutitionality, or perhaps its reasonableness, rationality, or its compatibility with fundamental principles of justice."[1] Constitutionality does not necessarily include the other three items since the contents of constitutionality are partly contingent. Still, it is not obvious how such a practice is to be counted as democratic, or as Jürgen Habermas has said pointedly, "It is not self-evident that constitutional courts should exist"[2]. Judges can strike down duly enacted laws authored by legislative majorities because they are incompatible with the fundamental law of the constitution. Democracy is self-government by the people; the judiciary is neither the legislature nor the people at large, and thus it is not a directly democratic institution. All defenses of judicial review of legislation on democratic grounds must therefore be indirect. The key

[1] W.J. Waluchow "Judicial Review" *Philosophical Compass* 2 (2007).
[2] Jurgen Habermas *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), pp. 238-9.

mechanism to indirect democratic governance is a theory of interpretation. This thesis is an attempt to test the adequacy of one recent and novel theory of constitutional interpretation that claims compatibility with democracy.

In this paper and the following two essays, I try to articulate the strengths and problems with W.J. Waluchow's defense of the judiciary in liberal democratic states. Waluchow claims that courts are mediums consistent with democracy because judges can determine a community's true moral commitments by common law reasoning, and thus the constitutional norms courts enforce are the true moral commitments of the people and when legislation is struck down they uphold those commitments against inauthentic legislative majorities[3]. This chapter will not be spent plunging directly into my sympathetic, but critical analysis of Waluchow's position on democratic justification; instead, I survey the philosophical questions at play in judicial review, lay out Jeremy Waldron's challenge to judicial review, demonstrate how two major theories of constitutional interpretation fail to address Waldron's critique, make a provisional case for Waluchow's riposte to Waldron, and conclude by sketching the approach of the next two chapters.

1. Judicial Review as a Problem of Political Philosophy

Discretion is a steep hurdle for defenders of judicial review in liberal democratic states. Judges exercise discretion when they decide cases on non-legal merits; judges have discretion when the law is indeterminate and the legal sources do not, and are not just thought to not, justify a unique outcome in a case[4]. Due to the legal realists' critique of precedent and legal reasoning[5], many jurists concede that courts have and exercise discretion in practice, but one does not make it a recommendation unless one allows that courts are not democratic and should be supported on other grounds. However, as my chosen epigraph shows, major proponents of judicial review argue the constitution is the best legal representation of the will of people, and it is the court's institutional duty to enforce the constitution. Constitutional restraints on legislative actions are often meant to protect rights citizen deem worthy of strong protection. Thus, it is odd at this stage to avail ourselves of non-democratic grounds in defending judicial review.

Judicial testimonies about the amount of discretionary authority they have and exercise conflict. Chief Justice John Marshall wrote that the judiciary "has no will, in any case.... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law."[6] Marshall puts forward an admirable goal at which judges should aim but Justice Benjamin Cardozo's response is instructive:

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[3] See W.J. Waluchow *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007).

[4] On the distinction between having and exercising discretion see W.J. Waluchow *Inclusive Legal Positivism* (New York: Clarendon, 1994), pp. 207-219.

[5] For a recent attempt to offer new arguments supporting descriptive realist positions on indeterminacy and discretion see Brian Leiter *Naturalizing Jurisprudence* (New York: Oxford University Press, 2007).

[6] *Osborn v. Bank of the United States* 22 U.S. (9 Wheat.) 738, 866 (1824), quoted in Cardozo *The Nature of Judicial Process* (New Haven: Yale University Press, 1921), p.169.

> It has a lofty sound; it is well and finely said; but it can never be more than partly true. Marshall's own career is a conspicuous illustration of the fact that the ideal is beyond the reach of human faculties to attain. He gave to the constitution of the United States the impress of his own mind and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions[7].

The remarks about law's plasticity and human limitations imply both the existence and exercise of discretion. It is easy to see why. Constitutional issues cover a broad scope so there is much litigation. The number of cases in a court's docket restricts the amount of time judges can examine each case. Where the law might appear unsettled, there may in fact be a legally prescribed outcome, but judges often make discretionary decisions on the merits of a case within the general restraints of existing doctrine to meet their duty of providing authoritative settlements of disputes. Discretion can be exercised intentionally or unintentionally as when judges think they are merely applying the law. Also, law is not only moulded at the level of the *supreme* courts. Lawyers present their cases in a certain light knowing a judge's temperament from his prior decisions. Aware of their ability to be overridden, lower appellate judges can subtly frame the facts of a case and emphasize certain precedents and higher judges may have no incentive to double-check the findings in deciding to hear an appeal or hearing an appeal itself[8].

Discretion is usually seen as a form of undemocratic judicial activism, or "crypto-legislation", a sufficient condition for what H.L.A. Hart called the nightmare vision of constitutional law.[9] The phantasmal perception of judicial decisions is not but the anxious dreamwork of jurisprudents, but an oft-heard complaint against judicial review in republican systems of government. The core of this *prima facie* just complaint is as follows: the people are sovereign in theory and constitutional preamble, but the final sovereign determination of what rules which life shall be governed by is actually made by an odd-numbered single digit group of partisan, untelevised, unelected, gowned (and sometimes wigged) lawyers with no expertise in moral reasoning who further hide behind Doric columns and mountains of clerk-authored obscurantist legalese when deciding controversial cases by majority voting according to their preferences[10]. In short, many purport that judicial discretion is exercised discreetly because it is unjustified.

When some liberal democrats first recognize constitutional courts' power and authority to determine the law, the tone of their response is similar to that of the anarcho-syndicalist peasants encountering King Arthur in *Monty Python and the Holy Grail*:

Arthur: I order you to be quiet!

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[7] Ibid. pp. 169-170.

[8] Richard H. Weisberg , *When Lawyers Write* (Apen: Aspen Publishers, 1987) pp. 10-11. Richard Posner notes that the practice of appellate courts slanting the facts is common, but not invariable in the U.S. legal system. See Posner's *Cardozo: A Study of Reputation* (University of Chicago Press: Chicago, 1990), p. 55.

[9] H.L.A. Hart "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream," in *Essays on Jurisprudence* (Oxford: Oxford University Press, 1983) p. 127.

[10] If I have missed any of the standard complaints then may the reader please add them herself.

Dennis's Mother: Order, eh? Who does he think he is?
Arthur: I am your king!
Dennis's Mother: Well I didn't vote for you.
Arthur: You don't vote for kings!
Dennis's Mother: How'd you become king, then?
Arthur: The Lady of the Lake, her arm clad in the purest shimmering samite, held aloft Excalibur from the bosom of the water signifying by Divine Providence that I, Arthur, was to carry Excalibur. That is why I am your king!
Dennis: Listen. Strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony.
Arthur: Be quiet!
Dennis: You can't expect to wield supreme power just 'cause some watery tart threw a sword at you!

Much like fictitious peasants, liberal democrats skeptical of judicial review thought themselves to be living in an autonomous collective. The legitimacy of both authorities' orders is not obvious. The mechanisms of judicial appointment and decision-making are, of course, different from the farcical legitimating myth of a fictional monarch, but the charge of non-election, along with lack of direct accountability or public understanding of odd ceremonies packs punch.

As a problem of political philosophy, the democratic justification of judicial review is of comparatively recent vintage. For a long time the United States was the only arguably-democratic state with a constitutional system of judicial review, and until shortly before their Civil War the power to invalidate federal legislation on constitutional grounds was rarely exercised by court. In the last century and half, however, many more constitutional democracies have arisen and the U.S. Supreme Court has invalidated numerous laws passed by both federal and state legislatures[11]. Despite Hamilton's famous

[11] The Courts are not necessarily the most frequent extinguisher of legislation in the U.S., and thus might not be the largest democratic problem. Sanford Levinson claims that "it is beyond argument that presidential vetoes accounted for more 'legislative fatalities' than have decisions of the Supreme Court, especially if we take into account the frequency of legislative concessions produced by the anticipation reactions of legislators to potential presidential vetoes," *Our Undemocratic Constitution* (New York: Oxford University Press 2006), p. 224. Presidents can exercise a subtle 'pocket veto' that can motivate changes in legislation just by hinting at a veto. Levinson cites the 2002 Library of Congress compilation of "Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States", which notes 158 cases of the Court invalidating federal legalisation that year, see *The Constitution of the United States of America: Analysis and Interpretation* (Congressional Reference Service, Library of Congress, U.S. Government Printing Office, 2004), pp. 2117-2150. Although the President vetoed no laws that year, he did use signing statements. Signing statements are declarations of how the law will be interpreted and applied that are affixed to bills as the executive signs a bill into law. They are similar in function to a line-item veto power or re-writing of laws. Levinson argues that the signing statements, vetoes, and hard to quantify conclusively pocket vetoes amount to more invalidations of federal law than those done by Supreme Court in American history. Political philosophers should pay the growth of these practices more attention. And I have said nothing about the considerable discretionary powers of administrative state agencies. See Charlie Savage "Bush Challenges Hundreds of Laws: President Cites Power of His Office." *The Boston Globe*. April 30, 2006 and Richard Epstein "The Problem with

claim that constitutional courts have neither the power of the purse nor the sword, but only judgement[12], they now have the power to make authoritative decisions about finance and force in many parts of the world. The philosophical problem is no longer a parochial one; although, it should be noted that the powers exercised by courts differ in different systems. Judicial review is not synonymous with judicial supremacy[13]. The Canadian Constitution, for instance, contains a 'notwithstanding' clause that allows for parliament to override validly a Supreme Court decision for five years[14]. The power has yet to be used at the federal level despite the Constitution's twenty-five year history, and it's an open question if it's politically wise or feasible to do so.

The scope of judicial review has increased since its inception not only in the U.S., but in other states adopting a similar model of judicial review such as Germany, Mexico, various former Commonwealth and Soviet states[15], Iraq, Venezuela and even England now has to make sure its laws are in accord with rights it has sworn to protect as a member of the European Union. The once uniquely American worry about illegitimate and undemocratic judicial usurpation of properly legislative powers has spread along with their model of constitutional review. That concern means the growth of constitutional courts is not obviously a social good like the proliferation of indoor plumbing. Judging lacks clear criteria for expertise beyond lawyerly skills, and given the moral nature of rights-centered constitutional law those skills seem insufficient for excellence in judgment.

Constitutional judiciaries in common law systems are often lateral-entry institutions where potential candidates need not be trained in how to discern between a law that fails or passes the test of constitutionality. It's become common for most appointees to be trained lawyers, but a scan of the constitutional literature produced in law schools evinces vibrant debates on both how constitutions are and ought to be interpreted within the legal profession. The only consensus on interpretive methods seems to be that interpretation is important, and disagreement extends to judges themselves. Philip Bobbitt has shown that judges in U.S. appellate courts often adopt different "styles" of argument: textual, structural, prudential, doctrinal, ethical or historical[16]. To some this practice smacks of opportunism; is there a principled way of defending the use of different types of arguments in similar cases?[17]

Presidential Signing Statements," *Chicago Tribune* July 16, 2006.

[12] *Federalist* 78, p. 496.

[13] For a discussion of other possible models see Mark Tushnet "Alternative Forms of Judicial Review," *Michigan Law Review* 101 (2003): 2781-2802.

[14] See *The Canadian Charter of Rights and Freedoms*, s. 33.

[15] See Andrew Arato "Dilemmas Arising from the Power to Create Constitutions in East Europe," *Cardozo Law Review* 14 (1992): 661 and Ackerman "Rise of World Constitutionalism" *Virginia Law Review* 83 (1997): 771-797 for a list. Whether this 'rise' is beneficial is yet unclear. Ackerman rightly stresses the difficulty of finding rigorous quantitative answers to questions about the patterns of successful systems of judicial review with a written constitution since the "number of success stories is much too small for statistical analysis; the number of variable much too large" p.775. These yet to be quantifiable domains are tempting because they are spaces for illuminating philosophical speculation and description in helping to devise quantifiable criteria of assessment and identification of key causal factors.

[16] See Bobbitt, *Constitutional Fate* (New York, Oxford University Press, 1982), pp. 7 -119.

[17] David Muttart has recently shown a similar variance in argumentation by the Canadian Supreme Court.

Unlike civil law systems where judging is a career position that comes with strict rules laid down by the legislature that foster a lack of judicial creativity, judging in most constitutional systems takes place within a common law model that allows for judges to fill in interstitial 'gaps' in the law should they find them and treats these decisions as sources of law[18]. The lack of agreed upon method worries many that judges can cleverly find gaps when they see fit, deploy an argumentative style that reaches his desired end, and then hide behind jargon, claiming that the decision was required by the law. The separation of powers leaves legislators with little recourse against this sort of hard to prove jiggery-pokery unless they collectively denounce the practice at the legally required supermajority level. Legislators would face problems of incentive and ability in these situations. The media often fails to convey to the public the violation of institutional roles so proper law-makers lack a push from their constituents to fix things; also, any corrections must overcome both the problem of assembling and mobilizing a supermajority coalition, and the partisan opportunism of opposition parties, or those who support the content of the decisions, denouncing the attempt as a near-seditious attack on another branch of government.

There are the widely acknowledged restraints of precedent and practical limits set by public outcry, but within these borders there is still no consensus on how to judge. Posner argues that judges have only two internal constraints[19]. First, judges have a desire for respectability, which means admiration of their skills by peers and legal professionals; second, there are the intrinsic satisfactions of judging done well[20]. Reputation sanctions fit into both constraints, but those standards are defined by a social practice that might not be of moral worth or rightly assess how the task should be done. Plus, the standards are subject to the disagreement outlined above.

Constitutional courts are not only suspect for fears about secret revisions to enacted statutes that may be rare, or unintentional. Even if judges are making good faith efforts to say what the law is and what decision they think is required in the case at hand, most appellate courts decisions are made binding by majority voting. In drafting an opinion, one judge will weigh a certain precedent more heavily than another who thinks that the case is sufficiently novel to not fall under the previously established rule[21] so the initial input appears subjective. If they cannot convince each other of the opinion's soundness behind closed doors, as split decisions demonstrate, they rely on majority voting to settle disputes. But this characterization suffers from some idealization of deliberations if we grant the candour of some judicial testimony. Posner, a current U.S. Seventh Court of Appeals Judge, remarks that "Judges do not deliberate collectively a great deal; they vote."[22]

See his *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (University of Toronto Press: Toronto, 2007).

[18] Criminal law excepted.

[19] *How Judges Think* (Cambridge, Mass.: Harvard University Press) p. 371.

[20] Loc. cit.

[21] For an argument that canons of construction used by judges can with equal plausibility almost always render conflicting outcomes see Karl Llewellyn "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed," *Vanderbilt Law Review* 3 (1950), esp. 401-406.

[22] Ibid, p. 375.

Counterintuitive as it might be, judges do not deliberate a great deal; it is a fact that the theorist of adjudication must take into account. In his popular history of the U.S. Supreme Court, former Chief Justice William Rehnquist has an interesting autobiographical discussion of court deliberations worth quoting at length:

> When I first went on the Court, I was both surprised and disappointed at how little interplay there was between the various justices during the process of conferring on a case. Each would state his views, and a junior justice could express agreement or disagreement with views expressed by a justice senior to him earlier in the discussion, but the converse did not apply; a junior justice's views were seldom commented upon, because votes had been already cast up the line. Probably most junior justices before me must have felt as I did, that they had some very significant contributions to make, and were disappointed that they hardly ever seemed to influence anyone because people didn't change their votes in response to their, the junior justices', contrary view. I felt then it would be desirable to have more of a round-table discussion of the matter after each of us had expressed our ideas. Having now sat in conference for nearly three decades, and having risen from ninth to first in seniority, I realize--with newfound clarity--that my idea as a junior justice, while fine in the abstract, probably would have not contributed much in practice, and at any rate was doomed by the seniority system to which the senior justices naturally adhere.
> ...If there were a real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the Court, that would be a strong argument for having that sort of discussion even with the attendant consumption of time. But my years on the Court have convinced me that the true purpose of the conference discussion of argued cases is not to persuade one's colleagues through impassioned advocacy to alter their views, but instead, by hearing each justice express his own views, to determine therefrom the view of the majority of the Court. This is not to say that minds are never changed in conference; they certainly are. But it is very much the exception and not the rule, and if one gives some thought to the matter, this should come as no surprise.[23]

Rehnquist's embrace of the practice aside, there is something bracing about his description of deliberations. Judges often work in isolation from each other, subjectively weigh the reasons differently (if they even agree on the relevant set), and their deliberations primarily have the function of identifying the majority so that the Chief Justice can assign authorship of an opinion. The reasons discussed in the opinion come mostly from the author and her clerks and once the document is complete judges can vote and offer up their dissents or partial agreements if they found something about the case worth the extra energy of writing another opinion.

Democrats should be puzzled by judicial voting even if there were thorough deliberations[24]. Why should a small set of nine, or three, or some odd number, judges

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[23] William Rehnquist, The Supreme Court (2001), pp.254-5, 258, cited in Posner (n. 19 above), p. 303-4.

[24] Judge Frank Easterbrook argues that voting makes Supreme Court opinions incoherent, see

vote on what the law of the land will be on contested issues of rights? The concern is striking given the political and institutional difficulties involved in overriding a judicial decision on constitutional matters by amendment.

After hearing the above list of the defects of judicial review, many defenders of the practice will play what they take to be their strongest card: the protection of minority rights. The institutional features of the judiciary coupled with a respect for a constitution are said to make courts better defenders of minority rights, especially in times of crisis. Posner argues that there are four major institutional or external constraints on judges. They are judicial independence (which also makes the job attractive), conflict of interest rules forbidding a judge to decide a case she has an interest in, promotion incentives for lower courts, and being reversed by a higher court [25]. Judges are also given fixed salaries high enough to insulate them from low-level bribes and are only subject to recall and impeachment for criminal behaviour. These features of the institution are widely, and probably rightly, seen as guaranteeing judges some autonomy from the tumults of politics and personal bias; in the end the factors combine to make judges likely to give oppressed minorities fair hearings. Many of the Warren Court's decisions in the middle of twentieth century are celebrated as high-minded defences of marginal individuals like criminal defendants, communists or racial and religious minorities against the sometimes fierce majority[26]. There are certainly many instances where courts ought to be praised on the grounds of meeting their noblest institutional justification, but the record is not flawless. To keep to American examples - Dred Scott, Plessy and Korematsu spring to mind as egregious failures[27].

The lack of a stable methodology leaves many to worry that minority rights protections are mostly a matter of an individual judge's temperament[28]. But even if that isn't true, it is by no means clear that courts help the causes their opinions support. One can be suspicious of the judicial powers for social change because courts lack enforcement and implementation powers. When the U.S. Supreme Court disallowed the federal removal of Cherokee tribes from Georgia on the grounds of tribal sovereignty[29],

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Easterbrook, "Ways of Criticizing the Court," 95 *Harvard Law Review* (1982), 811-32.

[25] Posner (n. 19 above), pp. 370-371.

[26] To list merely a few of the greatest hits: Brown v. Board of Education 347 U.S. 483 (1954) that desegregated public schools; Gideon v. Wainwright 372 U.S. 335 (1963) that held indigent defenders charged with non-capital offences must received publicly-funded council under the six amendment; Griswold v. Connecticut 381 U.S. 479 (1965) that invalidated a state law prohibiting sale of contraceptives because it violated the marital right to privacy; Miranda v. Arizona 384 U.S. 436 (1966) held that interrogation evidence obtained by police while a suspect is in custody is admissible only if the suspect is informed of his rights to an attorney and his right to not self-incriminate; and, Loving v. Virginia 388 U.S. 1 (1967) which invalidated all miscegenation laws..

[27] See *Dred Scott* v. Sandford, [1] 60 U.S. (19 How.) 393 (1857), *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and *Korematsu* v. United States, 323 U.S. 214 (1944). The cases upheld the legality of slavery, racial segregation and internment of Japanese-Americans during WWII respectively.

[28] This assumption is rife in current popular histories of the U.S. Supreme Court. See Peter Iron's *A People's History of the Supreme Court* (Penguin, 1999), *passim.* and its titular presence in Jeffrey Rosen's *The Supreme Court: The Personalities and Rivalries that Defined America* (Times Books, 2006). Irons is particularly aware of the idiosyncrasy of rights protection by the Court; his *Justice at War* (University of California Press, 1993) remains the unsurpassed legal history of Japanese internment in America.

[29] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

President Andrew Jackson is reputed to have said "John Marshall made his decision, now let him enforce it!" The executive did not honour the Court's decision. Even in cases where the laws are not openly flouted, judicial legislation can be only a symbolic victory. Courts can have negative effects on activists by pushing them towards ineffective judicial action rather than social or legislative change.

Courts need not only be opposed for making idiosyncratic, and sometimes ineffective, decisions about rights. The defects of entrenching morally, economic or democratically dubious practices have led Americans of different eras to oppose their Constitution wholesale. Prior to ratification, anti-Federalist author 'Brutus' (widely thought to be New York judge and delegate to the Federal Convention, Robert Yates) warned of judicial aristocracy. He thought judges under the Constitution would be independent in too full a sense:

> There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the law of the legislature. In short, they are independent of the people, of the legislature and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[30]

Abolitionist William Lloyd Garrison called the antebellum Constitution both a "covenant with death" and an "agreement with hell"[31] due to its facilitation and legitimation of slavery. Progressive historian Charles Beard argued that from the beginning the Constitution's function was to serve the economic interests of the landed gentry and has continued to provide an entrenched anti-democratic protection of the wealthy[32]. More recently, Sanford Levinson takes issue not with economic or rights issues, but with the systematic and unjustified barriers the U.S. constitution places on the democratic process. Levinson singles out the unrepresentative senate[33], excessive executive power[34], life tenure of supreme court justices who can plan for political retirement[35], excluding immigrants from certain offices[36], the practical impossibility of amendment by Article V on substantive democratic problems like those listed above[37]. If these complaints are combined with Levinson's earlier worries about the U.S. constitution being a civic religion[38], then one might worry that the ideology of civic life is inhospitable to democracy. It is worth noting that Levinson is not against constitutions. He argues rather that what is needed is a new constitutional convention composed of a broad range of

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[30] Letter XV, 20 March 1788, *The Anti-Federalist Papers,* p.183.

[31] Paul Finkleman *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 2nd ed. (New York: Sharpe, 2001). p. ix.

[32] *An Economic Interpretation of the Constitution of the United States* (Macmillan: New York, 1913).

[33] Levinson, (n. 11 above) pp. 25-78.

[34] Ibid, pp.79-122

[35] Ibid. pp. 123-140.

[36] Ibid. pp. 141-158.

[37] Ibid. pp. 159-166. The main example is that unanimous consent required for eliminating Senate seats, or the Senate. The Senate is democratically odious because it grants grotesquely disproportionate law-making power to small states.

[38] See Levinson, *Constitutional Faith* (Princeton, Princeton University Press, 1989).

citizens who are to write an alternative document and then have the public decide which is worthy of their consent and allegiance.

Worries about the systematically negative effects of certain constitutions are no doubt important, but they are too historically specific for our general philosophical questions about judicial review to be of much help. Instead, I will focus on the problems of judicial review clustered in the areas of discretion, interpretation, democracy and rights[39], though other concerns must enter our calculations later. I will not try to articulate a comprehensive defense of judicial review, but try to see if a democratic case can be made for reviewing rights disputes. Many critics of the practice think it is most indefensible when courts interpret rights-provisions of constitutions. They hold this view for three reasons:

> (1) Rights-provisions are of a moral nature, but there is neither consensus on their content nor means of objectively evaluating rights claims, so debates about rights are subject to reasonable disagreement.
> (2) Rights-provisions are couched in abstract language that provide little guidance so judicial interpretations of rights are necessarily subjective.
> (3) Judges have no special abilities to decide questions of rights well.[40]

From these claims the conclusion follows that citizens are disenfranchised and disrespected by judicial review. Critics also argue that legislative procedures can better respect the views of more people about rights and grant them more law-making authority; therefore, it is a more democratically respectable institution for dealing with rights.

A bit more needs to be said about the first point. Rights are a controversial concept, and there are many sophisticated skeptics about the entire concept. Raymond Geuss has argued that "Rights-discourse is a way of trying to immobilise society, to freeze it in an idealised version of its present form; not, of course, in its present *real* form, given that even recognised rights are rarely every fully implemented in any society at any time."[41] Given *de facto* judicial discretion and its centrality in determining rights for liberal democrats this is a valid concern. Geuss adds to the problem by noting that this practice implies a professional bureaucracy of lawyers in a democracy who are supposed "experts in rights-discourse". Philosophers are of little comfort here, indeed their accounts leads one to think that expertise in such discourse is of little content. Rights theories are:

> elusively polymorphous ... allowing great variation in the detailed way in which

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[39] My focus is on the legitimacy of judicial interpretations of rights-provisions in democratic justifications and not structural provisions. I choose to do this since that's where the debate's been and rights are convincingly subject to disagreement. Institutional/structural questions seem to be dependent on rights claims for rights are what the institutional structure are supposed to secure and protect. For an interesting dissent to my too curt argument here, see Adrienne Stone "Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review," *Oxford Journal of Legal Studies* 28 (2008): 1-32.

[40] My summary owes much to Stone's crisp rendition of the debate, see Ibid. 7.

[41] Raymond Geuss, *History and Illusion in Politics* (Cambridge University Press, 2001), p. 154.

> any particular theory is elaborated. Virtually every theorist has his or her own variant which is distinctive in some way or other. This means that the general approach centered on the concept of a 'right' is difficult to get cognitive purchase on; who has time to master all the variants?[42]

Courts can use various, and perhaps unprincipled, styles of arguments with different partisan conceptions of rights in an underpublicized practice. More public comprehension and official uniformity seem to be desirable remedies, but may be insufficient.

After this brief overview of the relation of judicial review and democracy one might be tempted to up Habermas's remark I cited earlier, as he does, by noting that the term 'constitutional democracy' appears to be a paradoxical unity of contrary principles[43]. There are several courses we can pursue after coming to this realization. One might acknowledge the policy role of modern courts in liberal democracies[44], and then praise that fact[45]. Or like Habermas, we might try to show that the paradox "resolves itself in the dimension of historical time, provided one conceives the constitution as a project that makes the founding act an ongoing process of constitution-making that continues across generations"[46]. That resolution occurs too much on the outside of the page, so instead I will try to get clearer about what a group commits itself to in constitution making, and how if its judicial practices jibe with its democratic commitments. If we disagree with Beard and Garrison and assume that constitutions aren't simply class tools then the ultimate question is this: does the problem of democracy and constitutional review by courts need to be remedied by a collective change of concepts and practices, or simply by a change in judicial methodology and greater public understanding of the institution?

In the interim we must clarify the type of normative theory we are engaged in. I then assess the strengths and vulnerabilities of the premier theories of adjudication in answering the three objections to the legitimacy of judicial review of rights-provisions in order to show the compelling nature of Waluchow's position in this debate.

2. Delimiting the Theory of Adjudication, Constitutions and Interpretation

(i) The Theory of Adjudication

As a philosophical task, the theory of adjudication is an unusual one not because of its twin descriptive and normative aims, but to the former's strong constraint on the latter. Of course, the ends of many areas of philosophy are to both describe and improve. Epistemologists are in part motivated to give an account of the nature of knowledge to help people in not acquiring false beliefs[47]. Metaphysicians seek to know what there is

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[42] Ibid, p. 152.

[43] Habermas "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?" *Political Theory* 29 (2001): 766-781.

[44] John Bell, *Policy Arguments in Judicial Decisions* (Oxford, Oxford University Press, 1983).

[45] Guido Calabresi, *A Common Law for the Age of Statutes*. (Cambridge, Mass.: Harvard University Press, 1982).

[46] n. 44 above, 768.

[47] See Philip Kitcher, "The Naturalists Return" *The Philosophical Review* 101 (1992), esp. 74-113.

and often rid our folk ontology of what is not[48]. Leiter argues that the anomaly of the theory of adjudication is not simply the conjunction of the two goals, but assigning lexical priority to the description[49]. Any desirable new rules must be close to current practices. One might challenge the claim that the theory of adjudication is so singular. Those concerned with medical institutions would argue that they work under similar tethers, and other non-ideal political theorists are also reigned in by givens. What motivates their limitations, however, are often facts about human biology or arguments about the Jacobin danger of idealism in politics.

In its focus on one institution and typically one social actor, the theory of adjudication is unique in non-ideal political theory. Leiter claims that its focused attention is best explained by what he calls the presumption thesis[50]. The thesis holds that such normative theory necessarily presupposes that the current adjudicative practice, and thus its underlying institutional structure, must be "*roughly right*" in terms of justice for theorists to accept the descriptive constraints on their normative ambitions. Leiter also argues that the recommendations offered are best explained by what he calls the standard relation thesis. The thesis is that judges ought to do pretty much what they already do only "more explicitly and more consciously" according to the theoretical description of their practice[51]. Theorists of adjudication are trying to make "a truer description than yet is"[52]. Provisionally, we should note the conservative orientation of this type of theory, although only in the sense of preserving existing practices. The descriptive constraints can, however, be productive to a variety of political orientations. Asking if a given social institution is justified on democratic grounds to which its participants are committed, can provide a more focused and practically fruitful political philosophy than asking the relevant ideal questions. If before asking whether judicial review is democratic we had to account for the value of the laws reviewed, defeat the antinomian in demonstrating the value of law itself, followed by explaining the nature and value of democracy, then our work risks becoming excessively abstract to have any purchase on current social debates. That said, whether there's too little or too much play between the descriptive and the prescriptive in this type of theory will be reopened at the close of this thesis. For now, it's enough to note that one aims for a 'close enough' description, provided our suggested reform-minded remedy is not wildly counterfactual and its implementation is an historical (not merely a logical) possibility[53].

The non-ideal character of my argumentation is also evident in my thin notion of democracy. Democracy is a system of government where the people are *ultimately* responsible for the laws by which they are governed. Responsibility implies participation in enacting law so some measure of participation is necessary, though I do not quantify a requisite amount or its channels. The thin account is not a claim that these requirements

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[48] P.F. Strawson aptly labels these tasks 'descriptive' and 'revisionary' metaphysics, *Individuals* (1959), p. 9.

[49] Brian Leiter, "Heidegger and the Theory of Adjudication," *Yale Law Journal* 106 (1996), 256.

[50] Ibid., 257.

[51] Ibid., 258.

[52] John Mackie "The Third Theory of Law," *Philosophy and Public Affairs* 7 (1977), 9.

[53] Posner argues that one needs to understand judicial behaviour accurately and possess a reasonable account of judicial psychology for legal reforms to be successful. See n. 19 above, p. 5.

exhaust democracy, but that they provide clear and uncontroversial criteria for assessing judicial review's democratic character. If the practice cannot meet a weak test, then more robust definitions would only give a more emphatic answer. Finally, this account has the virtue of being neutral towards procedural and substantive conceptions[54].

Before we close these methodological reflections, skepticism about the causal efficacy of theories of adjudication must be noted. Posner writes inertly that:

> They do not weaken the force of political preferences. They supply not 'actionable' reasons but rationalizations for actions taken on other grounds, though a fuller test of this proposition would require comparing judges who have similar judicial philosophies but different political leanings, and asking whether their decisions tend to converge or, as I predict, diverge.[55]

Thus, one need not rely on the notion of methodology to account for the stability of law. What stabilizes some areas of law is an ideology shared by judges, for instance the current consensus about the scope of the market in commercial and contract law[56]. In discretionary situations most judges will employ similar non-legal reasons and create stable doctrine. The selection and screening processes necessary for judicial appointment means that many similar individuals with what legislators on selection committees and pressure groups deem socially and politically acceptable views will make it in, and extremists relative the consensus will not and only their views will be seen as ideological[57]. This account does not disprove method providing motivation and a more defensible stability of legal doctrine, but as these questions rely largely on questions about psychology I will bracket the efficacy of theory concerns.

Two major constraints on theories of interpretation emerge from these reflections. First, any reforms must meet a strong version of the 'ought implies can' restriction. If judges cannot undertake our proposed changes then the proposal is both idle and insufficiently justified because there could be other policy reforms to achieve the same ends that our narrowly focused analysis may have missed. Second, our advice should be effective in meeting our justificatory aim. If one wants courts to be more democratic then the reforms must be instrumental in achieving this[58].

(ii) Constitutions

'Constitution' has both a thick and thin legal sense. The thin sense means there are laws establishing and regulating the main organs of government. The thick includes

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[54] On procedural versus substantive constitutional conceptions of democracy, see Waluchow (2007), n. 3 above, pp. 106-7.

[55] Posner "How Judges Think" (n. 19 above), p. 346. For a similar set of concerns about theories of adjudication see Brian Leiter, "In Praise of Realism (and Against 'Nonsense' Jurisprudence)" (March 26, 2008). Available at SSRN: http://ssrn.com/abstract=1113461.

[56] Ibid., p. 373.

[57] Ibid., p. 374. The rejection of Robert Bork is well-described in these terms.

[58] See Leiter "Naturalism in Legal Philosophy," <http://plato.stanford.edu/entries/lawphil-naturalism/>.

the thin, but also specifies the general principles under which a state is to be governed[59]. It is the thick sense we are concerned with. Fortunately, there is a general agreement among jurists about the key features of these artifacts.

There are seven key features of constitutions in the thick sense:

> (1) They constitute the legal and political structure of the legal system.
> (2) They are stable and long enduring.
> (3) They have a canonical (usually written) formulation.
> (4) They are the superior law of the system.
> (5) Judicial procedures are in place to enforce their status as superior law.
> (6) They can be changed by special procedures (usually) specified by the formulation in (3) and change is difficult to enact
> (7) They include aspirational principles of government that express a common ideology of their subjects.[60]

Andrei Marmor, generally agrees with this list but reduces it to five. The only major differences to note is that Marmor would treat (7) as having moral content and that the formulations in (3) are general and abstract.[61]

With constitution defined, we can ask two major philosophical questions about it. One can ask for an account of the authority of a constitution and a theory of its interpretation. The theory of interpretation is dependent on the account of authority[62]. The authority of a constitution must be moral in some sense to avoid a circular account where its legal authority is established by its authority as law. Most constitutional preambles claim that the authority of a constitution derives from the consent of the people and it is roughly this account that we will treat as the criterion of legitimacy. Bruce Ackerman observes that the liberal political character of constitutions is an attempt to change the charismatic authority of constitutional authors into a legal form, which allows constitutions to serve "as a powerful (but far from all-powerful) symbol of national identity and democratic commitment"[63]. Constitutionalism is a political commitment to limiting government powers legally; allegiance is to a set of principles and not a group of persons, and governing authorities are illegitimate if they transgress the limits[64]. Lastly, constitutional law refers only to public law or cases involving state action.

Despite the presence of constitutions or charters in international law, they will not be our focus. As international lawyer José Alvarez suggests about the U.N. charter, it "seems terribly misleading to read the Charter, a document premised on a realpolitik

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[59] See Joseph Raz "On the Authority and Interpretation of Constitutions" in *Constitutionalism* Ed. Larry Alexander (Cambridge: Cambridge University Press, 1998), p. 153.

[60] Ibid, pp.153-4.

[61] Marmor, *Interpretation and Legal Theory,* 2nd ed. (Oxford University Press, 2005), pp.142-3. Waluchow's account of constitutions is roughly similar as well, "Common Law", n. 3 above, pp.15-52.

[62] Raz "Interpretation" (n. 60 above), p.157.

[63] Ackerman (1997), 783. Constitutions are also generally associated with weak militaries, p.791 where a party cannot rule through means of force alone,

[64] Waluchow (2007), p.21 distinguishes legitimacy to political, moral and legal.

assessment of what sovereign states would tolerate in 1945, as a democratic document"[65]. One need not agree entirely with this view of the U.N. Charter, but its democratic pedigree and character is not as compelling as those of state constitutions. More work needs to be done comparing state constitutions and charters of international organizations. For now, we shall treat the constitutive rules of existing international organizations as falling outside our questions of democratic justification.

(iii) Interpretation

Various domains are said to require interpretation, but a general account of the practice that accurately describes all the particulars is not attempted here. Instead, I describe interpretation in law, especially the common law, with some eye towards consistency with other practices of interpretation.

Interpretation in law occurs in deciding cases. The judge is the main interpreter, but under the common law he is importantly passive at the outset. A case is brought to court and if it has the requisite standing a judge will hear it. Adversarial attorneys present statements of fact to the court, argue for a certain resolution to the dispute and cite precedents in favour of their desired outcome. If we exclude concerns of discretion, ideology and personal bias to paint a common picture of the judicial task, judges weigh the variety of evidence presented during trial, assess the force of precedents should the case appear to fall under more than one and finally make a decision about how the dispute is to be settled according to the law. The conclusion of legal reasoning is a decision and this is achieved by applying standard cannons of construction on the premises, which are the facts and the rules and principles of law.

Ronald Dworkin has famously argued that even under this common picture of finding out what the law requires in a case judges must interpret the law, where interpretation is a mix of evaluative and descriptive reasoning[66]. The claim that interpretation is evaluative seems correct for interpretation in aesthetic domains, but is not clear that deciding legal cases entails interpretation in a morally evaluative sense. Marmor argues that if we look to Wittgenstein's rule-following argument where a rule can be followed without an interpretation[67] then we need not accept Dworkin's premise. We can avoid interpretation because semantically interpretation is rather like clarification or translation[68] since interpretation "is an explanation of one thing in terms of another," and because there are public and learnable meanings for a set of legal predicates that include practical implications[69]. In clear cases there are clear meanings to the key terms and they provide adequate guidance. Marmor concludes that interpretation in law is thus "essentially concerned with meaning in its pragmatic sense, namely, *meaning that* such and such by a given expression"[70]. The pragmatic sense varies in different systems according to what the constitution deems relevant or what has been practiced.

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[65] *International Organizations as Law-Makers* (New York: Oxford University Press, 2005), p. 69.
[66] See *Law's Empire* (Cambridge, Mass.: Harvard University Press 1986), pp. 45-114.
[67] Wittgenstein *Philosophical Investigations*, 198 and 201; Marmor *Interpretation*, Ch. 7., n. 61 above.
[68] Marmor *Positive Law and Objective Values* (Oxford, Clarendon, 2001), p. 76.
[69] Ibid, p. 78, and 78-81.
[70] Marmor *Interpretation*, n. 61 above, p. 28.

A constitution is largely comprised of clear sentences. For instance, the U.S. Constitution states that the President must be at least 35 years old, which is uncontroversial as to its meaning. To speak perhaps too schematically, the line between felicitous and infelicitous propositions of a constitution is analogous to the separation of most written constitutions between statements about the governmental division of labour and bills of rights. Statements about rights are meaningful, but unlike statements about electoral cycles, their semantic content is subject to principled dispute. Rights-propositions could thus be said to be infelicitous because interpretations of these predicates vary without an agreed upon standard of correctness. Infelicity could thus lead to constitutional infidelity if incorrect methods are chosen to resolve the issue.

The ambiguity or vagueness of a written constitution leads the judge, acting as constitutional interpreter, outside of the text in search of definitive evidence to resolve the problem. But again, there is no agreement on the relevant non-textual evidence in the systems with which we are concerned. For instance, some hold that intentions of authors or ratifiers should be authoritative to solve unclear meaning, and others hold that morality should solve the problem of indeterminate or vague predicates. Marmor is likely correct that some meanings are clear and have straightforward implications, but the nature of the other evidence depends on the type of authority a constitution claims.

Language does not always resolve disputes. Sometimes it will be ambiguous or lead to absurd results. Due plain meaning's insufficient guidance, Llewellyn goes so far as to hold that "If a statute is to make sense; it must be read in the light of some assumed purpose. A statute declaring a rule, with no purpose or objective, is nonsense"[71]. Even bus companies use placards to tell you why you must stay behind the line by the driver's seat when the bus is in motion. However, purpose may be more projected onto laws other than their actual purpose, and the danger of this approach to interpreting legislation is that it often overrides legislative compromise[72]. The reliance on intentions, or some other unwritten or extra-statutory source like purpose, legislative intent or morality brings to light the possibility of multiple legally justifiable answers to a single legal dispute. For a realist like Llewellyn such remarks are platitudes, he writes that "One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or reading a bunch of cases" for if "rules decided cases, one judge would be as good as another, provided only the rules had been adduced before him"[73]. Yet despite the evidence of conflicting sources of evidence and the noted expertise in judging "Man (even though he learned square-roots in high school) finds more than one *right* answer hard to conceive of"[74].

The type of non-textual evidence courts should refer to in resolving hard cases varies by system, but all systems need to resolve solutions on non-textual grounds. Many jurists agree with a limited form of the realist insights about adjudication and argue that legal systems have disputes with more than one legally justifiable outcome. The sources of multiple legal resolutions, cases where the law is indeterminate, are of three general

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[71] Llewellyn, n. 21 above, 400.

[72] Posner, n. 19 above, p. 336.

[73] "Constitution as Institution," *Columbia Law Review* 34 (1934): 1-40, 7.

[74] Ibid, p.9.

types: language, legislative conflict, and interpretation[75]. Legal predicates can be afflicted with vagueness or higher-order vagueness where we're unsure a predicate is vague or the law can contain conflicting principles (some with constitutional status) or the law can contain contradictions or there are multiple interpretive methods that can be used.

Timothy Endicott argues that legal principles and normative terms are necessarily vague[76] and thus "a legal system with no vague laws is impossible" because law needs "to regulate a *variety* of human activity in a *general way*"[77]. Vagueness plagues the abstract standards law must use to have a chance of fulfilling even a minimal account of its function of guiding conduct. Abstract terms, whether normative or causal will be vague at a point. The need for interpreting the meaning of these provisions is not simply due to their ambiguity and the need to sort out multiple discrete meanings. Problems of vagueness are unlike uncertainty about which sense of 'stool' is relevant to health safety law. When dealing with vague predicates a judge might decide to side with an interpretation that better coheres with existing doctrine, but as Raz observes "the fact that whichever rule the court adopts is analogical to some existing rule is still relevant in showing that the court is not introducing a new pragmatic conflict but is supporting one side in an existing dispute"[78]. Interpretive methods might not be helpful in determining those predicates without injecting some partisanism. Even the apparent neutrality of method hides much plasticity. As Leiter notes the legal realist arguments for legal indeterminacy rest "primarily on the existence of conflicting, but equally legitimate, *interpretive methods*, e.g., conflicting ways of reading statutes, or construing precedents"[79]. For a creative judge a large body of precedent and the basic canons of construction can allow for the building of a fort or a split-level ranch. Posner goes so far as to claim that the U.S. appellate courts are "awash in an ocean of discretion"[80].

As a consequence of indeterminacy, Raz claims that interpretation necessarily requires innovation in some cases[81] and depending on their institutional role and authority "Judicial interpretation can be as creative as a Glen Gould interpretation of a Beethoven piano sonata"[82]. There are some constraints due to the authority courts must follow, the moral nature of the norms they expound and the tools and reasons at their disposal. Raz writes that the "limitation on the law-making power of the courts and the existence of legal duties which they are bound to observe in exercising such powers may prevent the courts from adopting the best rule and may force them on occasion to settle for second best"[83]. Raz does not mean all this as a theory of interpretation[84], but as facts about adjudication. Ultimately, judge-made law is constrained because of existing precedent, its

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[75] One might add disputed facts, but that is an epistemic issue, and certainly not part of the class of conflicting legal reasons.

[76] *Vagueness in Law* (Oxford University Press, 2000), pp. 126-131, and 163-6.

[77] "Law is Necessarily Vague," *Legal Theory* 7 (2001): 379-385, 382.

[78] *The Authority of Law* (Oxford: Clarendon, 1979) p.205.

[79] Leiter "Naturalizing", n. 5 above, p. 20.

[80] Posner "How Judges Think", n. 19 above, p. 272.

[81] "Interpretation", n. 60 above, p. 177.

[82] *Ethics in the Public Domain* (Oxford: Clarendon, 1994), p. 230.

[83] *The Authority of Law,* n. 78 above, p. 197.

[84] See his second Storrs Lecture at Yale, 2003, available at http://www.law.yale.edu/outside/av/ram/lectures/YLSStorrsRaz032503.ram.

reactive nature, and that judges cannot use the wide policy resources of legislators[85]. Whether judges can and should be further restrained by an interpretive method following from a proper account of the constitution's authority remains to be seen.

Supreme courts face the problem of the nature of constitutional authority more often and directly than lower appellate courts who are bound to follow the higher court precedents. Even if the Supreme Court has made an error the lower court must follow the law, or as Posner put it, those judges are potted plants[86]. It is easy to see why; as Neil MacCormick notes "only confusion and expense is caused by lower courts declining to follow precedents set by higher courts; so, standardly, the latter's decisions are binding on the former"[87]. Levinson claims that the implications of this practice are clear, "the operating theory of the 'inferior' judiciary is precisely that the discipline techniques of legal analysis take second place to obedience to the particular persons who contingently occupy the top positions in the judicial hierarchy"[88]. The focus of my attention is decision-making at the Supreme Court since Justices tend to feel less constrained by precedent[89], and the problems of precedent and method are more clearly on display than in lower courts.

The issues pertaining to legal indeterminacy outlined above require further discussion, but I take up the problems again in greater detail in Chapter 3. The stage has now, however, been sufficiently set to address the problems of judicial interpretation of rights disputes directly.

3. Waldron's Democratic Critique of Judicial Review

The core of Waldron's critique of judicial review is a combination of familiar institutional competency arguments and a leveling of the playing field between the philosophers' principles and the politicians' policy. This leveling is not meant pejoratively for Waldron aims to efface a distinction by recognizing high-minded elements in the legislative process. Political philosophers should treat civic disputes with the same regard as they do debates in their specialized journals because "Political philosophy is simply conscientious civic discussion without a deadline"[90]. Waldron's erasure of a distinction central to many justifications of judicial review is predicated on reasonable disagreement in an evaluative domain without an epistemology to falsify claims within it[91]. In this

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[85] *Authority of Law,* n. 78 above, p. 105.

[86] Posner "What am I? A Potted Plant?" *The New Republic*, Sept 28, 1987, p. 23.

[87] *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978), p. 227.

[88] "On Positivism and Potted Plants: 'Inferior' Judges and the Task of Constitutional Interpretation," *Connecticut Law Review* 25 (1993): 843-853, 845.

[89] As Julius Stone puts it, the doctrine of precedent there is "not so much a straitjacket as a capacious muumuu" *Precedent and Law: Dynamics of Common Law Growth* (New York: Buttersworth, 1985) p. 229, quoted by Ponser (2008), p. 183.

[90] "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13 (1993): 18-51, 35.

[91] I explore these meta-ethical arguments more thoroughly in Chapter 2. For now, it's assumed that the best explanation of disagreement about rights is that we cannot objectively know which account is true though we think much rights-discourse is cognitive so we're left with reasonable disagreement. The limit of access does not, however, mean that rights are essentially-contested concepts where dynamic agony is part

respect, Waldron's thought bears the marks of his teacher Ronald Dworkin, though Waldron admits his epistemic limitations forthrightly and tries instead to ground his institutional recommendations only in process-based concerns about how best to deal with the facts of disagreement and the need for collective coordination.

Rights and three interesting facts of social life are the keys to Waldron's critique. The first two facts are that disagreement about rights is pandemic in modern liberal democratic societies[92] to the point that it must be regarded "as one of the elementary conditions of modern politics"[93] and there is no uncontroversial or objective means of settling these disputes. Constitutional law binds current and future generations to a certain set of rights that are subject to reasonable disagreement, yet gives a few justices with no special knowledge of rights the power to make their interpretations binding. Citizens' main participatory right, the right to democracy (about which we assume some agreement on content), is thus not allowed its proper scope as "a right to participate on equal terms in social decisions on issues of high principle," instead it is "confined to interstitial matters of social and economic policy"[94]. Even on the interstitial matters where people currently have power their consciousness is hampered by peculiar constitutional language that can limit what its citizens see as rights[95]. Further, it might be said that to entrench a right in a constitution is to view one's fellow citizens as Hobbesean predators who need to be kept in line by judges whose authority does not rest on expertise[96].

The third key fact of life is the need for collective decision-making in the face of disagreement. A theory of justice and rights requires a theory of authority. Decisions must be made[97]. Law's very function and authority is identified with the building of frameworks for coordination and collective action despite disagreement[98]. One might deny the need for coordination and argue that we could just slide back into a state of nature, but Waldron seems to think that would ignore the moral psychology of liberals since there is a "felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what the framework, decision or action should be". The 'circumstances of politics' are about the felt need for coordination by disagreeing agents[99].

Judicial review is not the best means to solve the problems generated by the circumstances of politics. Waldron holds that "the society in question ought to settle the disagreements about rights that its members have using its legislative institutions"[100]. Law will be authoritative and legitimate to disagreeing parties if they are allowed to debate

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of the concept's essence. Waldron notes also the distinction between essentially-contested concepts and vagueness where vagueness is due to language's open texture, a name for an inelminiable possibility because it is possible to come up with borderline cases for every predicate. See "Vagueness in Law and Language: Some Philosophical Issues," *California Law Review* 82 (1994): 509-540, 512.

92 "Rights-Based," n. 91 above, 34-35.

93 *The Dignity of Legislation* (New York: Cambridge University Press, 1999) p. 153.

94 "Rights-Based," n. 91 above, 20.

95 Ibid., 26.

96 Ibid., 27.

97 Ibid., 32.

98 *Law and Disagreement* (Oxford: Oxford University Press, 1999) p.7.

99 Ibid., p. 102.

100 "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (2006): 1346-1406, 1360.

and have a majority voting procedure decide what will coordinate activity. Unlike losing plaintiffs or defendants, the losers of a majority vote simply think it's a contingent loss and their opinions are valid and worth respect, which differs greatly from judges declaring their interpretation of rights wrong. Every piece of legislation under majority voting is an achievement that faces hard facts of pluralism and acts respectfully to all in the face of them[101]. He writes "the method of majority decision attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others"[102]. In terms of respect and fairness, majoritarianism is the most egalitarian solution to these social conditions and provides the best procedure to achieve those values[103]. Voting is not an expression simply of will, but also of reason and majoritarianism affords equal respect to each individual's reasons, while judicial review does not, and thus is inherently undemocratic and unjust[104]. Waldron is not making the facile error of conflating democratic principles for what H.L.A. Hart terms "moral populism", which is the "view that the majority have a moral right to dictate how all should live"[105]. The concerns for minority protection and respect are leitmotifs in Waldron and his hypostatization of 'deep disagreement' *prima facie* vitiates an objective moral right of a majority to impose its own moral views. There seems to be another crucial psychological assumption that liberals want respect like Hobbes thought humans mainly desired pride. Legislative procedure is justified on the above grounds even if judicial review has better substantive outcomes because it will always lose when it comes to the "respect accorded to ordinary citizen's moral and political capacities"[106].

In a recent article, Waldron qualifies the general objections outlined above though they remain the same objections. Waldron opposes only *strong* judicial review where "courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights"[107]. These courts can also refuse to apply laws so that they become dead letter. Courts can review legislation, executive and administrative action, and structural provisions of a constitution. By contrast, weak judicial review allows that "courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it simply because rights would be otherwise violated"[108]. The scrutiny can have effect, like creating a cabinet position to 'constitution-proof' a bill. About the strongest weak judicial power is that courts can find interpretations of law so they do not violate rights, as judges can in New Zealand[109].

These claims are further qualified by some factual assumptions, thus his argument

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101 *Law and Disagreement,* n. 99 above, p. 108.
102 *The Dignity of Legislation* (Cambridge University Press, 1999), p. 148. see n. above
103 Ibid., p. 153.
104 "Rights-based", n. 93 above, 50.
105 *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963), p. 79
106 "Rights-based", n.93 above, 46.
107 "Core", n. 102 above, 1354.
108 Ibid., 1353.
109 Ibid., 1356.

against strong judicial is highly conditional. The four conditions are that:

> 1) democratic institutions in reasonable good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good working order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights among the members of the society who are committed to the idea of rights.[110]

He adds to this list, the assumptions that "there is a strong commitment on the part of most members of the society we are contemplating to the idea of individual and minority rights"[111]. This commitment is accompanied by an "awareness of the worldwide consensus on human rights and of the history of thinking about rights. I assume that this commitment is a *living consensus*, developing and evolving as defenders of rights talk to one another about what rights they have and what those rights imply"[112]. Yet "the consensus about rights is not exempt from the incidence of general disagreement about all major political issues"[113], specifically people substantially disagree about "what rights there are and what they amount to"[114]. If one of the four key conditions is not met, then it "may still be the case that judicial review is necessary as a protective measure against legislative pathologies relating to sex, race, or religion in particular countries"[115]. But these reasons would be an exception, and if one makes a case on those grounds one should humbly admit the problems with a society and the need for a special corrective[116].

The model of legislation Waldron advances is aspirational; a polemical device to combat the trend of recent jurisprudence to idolize the judiciary[117]. Waldron has spent much of the last fifteen years trying to wipe the Vaseline off the lens through which many jurisprudents view courts, but he then applies it to another camera he uses to take wide-angle shots of a vibrant backlot legislature. Even the treacle-prone Frank Capra had the sense to eschew schmaltz when he portrayed the corruption of the Senate by big business in *Mr. Smith Goes to Washington*. The benefits and burdens of optimism and cynicism should be distributed equally so no institution is disrespected[118]. Having given a brief overview of the critique and its assumptions, we can survey some responses to Waldron[119].

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[110] Ibid., 1360.
[111] Ibid., 1364.
[112] Ibid., 1365, emphasis mine.
[113] Ibid. 1366.
[114] Ibid. 1367.
[115] Ibid. 1352.
[116] Ibid. 1406.
[117] *Dignity*, n. 103 above, p.1
[118] Posner makes a similar point in his "Review of Jeremy Waldron: Law and Disagreement," *Columbia Law Review* 100 (2000), 581.
[119] The literature is large and growing. A cursory sample must include Thomas Christiano "Waldron on Law and Disagreement." *Law and Philosophy* 19 (2000): 513-543; David Estlund "Jeremy Waldron on

The critiques fall generally under three headings: Waldron lacks a theory of democracy, he loads the dice for his proposal by hiding agreement in certain premises, or if his deep disagreement arguments are as deep as he often claims then his position is caught in an infinite regress. All these criticisms are sound. It is also arguable that Waldron has backed off key premises of the anti-judicial review argument and implicitly has abandoned the position. Allan rightly claims that Waldron's defense of the citation of foreign law in constitutional courts on the grounds of international consensus on rights issues empties the deep disagreement premise[120]. Waldron's challenge to the torture perpetuated by the U.S. government also relies on the notion of legal archetype which is a publicly-known principle that acts as an emblem for a deep agreed upon commitment, which judges could access rather competently[121]. These moves do not mean his criticisms of judicial review are invalid, but they require a second look if Waldron is actually moving away as he seems to be. But there is still much that is difficult to respond to adequately in his criticisms even if his recent work weakens key premises. First, however, it is worth further noting the initial problems.

For Waldron there are no strong criteria for demonstrating which institutional arrangements are democratic. Posner writes that Waldron is without "a theory that would explain what specific rules and institutions relating to voting, districting, legislative procedures, legislators' qualifications, frequency of election, and the like are necessary in order for the legislative product to be deemed democratic"[122]. Waldron holds that "Bills do not reason themselves into legal authority; they are thrust into authority with nothing more credible than numbers on their side"[123]. Marmor nicely expands on a problem here. There is a tension between Waldron's deliberative model of decision making in the wisdom of the multitude argument that aims for consensus[124] and his majoritarianism, which is a procedure used when consensus is unlikely after deliberations[125]. But if meta-ethical and empirical claims about disagreement underlying his majoritarianism are true then how is wisdom to emerge by deliberation? Marmor thinks that his mistake lies "in the assumption that most of the functions of law in our society concern such deeply disputed matters of principle"[126].

Law and Disagreement" *Philosophical Studies* 99 (2000): 111-128; J#urgen Habermas "On Law and Disagreement. Some Comments on 'Interpretive Pluralism'." *Ratio Juris* 16 (2003): 187-94; Alieen Kavanaugh "Participation and Judicial Review: A Reply to Jeremy Waldron." *Law and Philosophy* 22 (2003): 451-486. Andrei Marmor "Review: Law and Disagreement by Jeremy Waldron, The Dignity of Legislation by Jeremy Waldron." *Ethics* 112 (2002): 410-414; Richard Posner "Review of Jeremy Waldron: Law and Disagreement." *Columbia Law Review* 100 (2000) : 582-592; Joseph Raz "Disagreement in Politics." *The American Journal of Jurisprudence* 43 (1998): 25-52; and Waluchow (2007, see n. above) pp. 240-268.

[120] James Allan (2008) "Jeremy Waldron and the Philosopher's Stone" Available at: http://ssrn.com/abstract=1095532.

[121] Waldron "Torture and Positive Law: Jurisprudence for the White House" *Columbia Law Review* 105 (2005): 1681-1750, 1721-1735.

[122] Posner, "Review," n. 119 above, 590.

[123] *Dignity*, n. 103 above, p. 127.

[124] *Law and Disagreement*, n. 99 above, p. 134, he speaks of "pooling" reasons.

[125] Marmor, "Review", n. 122 above, 412-3.

[126] Ibid., 413.

Habermas has further pressed the tension between deliberations, disagreement and reasons. A proceduralist conception of legitimation "requires a higher-order positivism that explains why a procedure like processes of deliberation enjoys and displays 'authority' apart from the cognitive merits inherent in rational discourse"[127]. But when the proceduralist looks for further facts to ground it, respect won't do since it presupposes a shared principle of fairness and agreement[128]. Waldron argues that when discussion is exhausted a vote can be called for. Habermas shrewdly notes that the notion of exhaustion points to the real content that grounds Waldron's proceduralism, "Without the epistemic promise of an unrestricted exchange of a sufficiently wide range of relevant reasons, the legitimizing force that springs from a formally structured deliberation would remain mysterious."[129] Participants need to be presupposing counterfactually "the *possibility* of an agreement that is worthwhile to aim at."[130] This presupposition is the substantial background consensus that allows for disagreement to emerge and citizens to conceive of themselves as part of a common project.

Second, despite Waldron's lovely prose and voluminous and often convincing arguments, substantial agreement is presupposed elsewhere in his account. Individuals agree on the framework of individual rights, but if we're without a higher order criteria to settle rights disputes then why support the framework at all? Why not make the central concept of politics virtues or values instead of rights? And why couldn't there be anti-liberal collectivists in our midst as there seem to be? Waldron has written of "our commitment to individualism"[131], but without identifying the possessor. He argues that "justice is individualistic in a double sense; justice is assessment *of* individual outcomes *by* individualized criteria"[132], if justice has this agreed content then is there not a firm limit to the shape of disagreement about the Right?

Third, if we ignore the above concerns and assume for the sake of argument that there is deep disagreement about the Good and the Right, then how do we accord equal concern and respect pride of place in the justification of institutional procedures? As Waluchow notes, Waldron is caught in an infinite regress if deep disagreement applies to rights and value predicates since there would be no non-question begging or non-partisan way of grounding a procedure[133]. There needs to be more argument on the boundaries of disagreement, for if it's *all the way down*[134] then communication becomes mysterious, if it's not then his disagreement premise doesn't help his case. Also, *deep* disagreement is implausible because conceptual relativism and mental pluralism are implausible theses.

As a conceptual point it's odd to think that conceptual scheme relativism is true. Humans do not have totally incommensurable frameworks. Donald Davidson notes that we all inhabit the same world and possess similar sensory and cognitive apparatuses, so

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127 Habermas "Interpretive pluralism, n. 122 above, 190.
128 Ibid., 191.
129 Ibid., 191.
130 Ibid., 193.
131 Waldron "The Primacy of Justice," *Legal Theory* 9 (2003): 269-294, 280.
132 Ibid., 280.
133 *Common Law*, n. 3 above, pp.249-254.
134 *Law and Disagreement,* n. 99 above, p. 295._

to presuppose incommensurable conceptual schemes is implausible[135]. Also, grammar itself, let alone 'conceptual schemes', is constrained[136] and grammar is already a normative schema of classification[137]. These points nicely combine with evolutionary claims. Deep disagreement may be impossible since "Any zoologist would classify our species as obligatorily gregarious"[138] and our cooperative nature implies shared social norms.

Even though his position has substantial flaws, Waldron justly situates the terrain for argument about the legitimacy of judicial review. Participatory values are often overlooked by advocates of judicial review, and Waldron rightly draws our attention to them. Further, there are strong reasons to think that rights claims are subject to reasonable disagreement, and that judges make partly subjective decisions about their contents and this requires justification on representative grounds. So, even if many of Waldron's core arguments have been weakened, he has still identified the normative axis on which debate about judicial review must be settled.

4. A Brief Tour of the Insights and Blind Spots of Some Prominent Theories of Constitutional Interpretation

In the following three subsections major theories of constitutional interpretation are examined to see if they meet both the descriptive constraints discussed in section 2. (i) and Waldron's three criticisms of rights adjudication.

(i) Dworkin's Moral Reading

The constitutional theory of Ronald Dworkin is inextricably bound up with his account of law as an interpretive concept. His theory of law is a theory of adjudication. The extent to which Dworkin's ideas have developed and changed throughout his long career is unclear. In his early work, he criticized legal positivist theories of law by claiming they could not account for principles in legal reasoning and in turn argued that law must always have a right answer if individual rights are fundamental. Later he argued that law is an interpretive concept closely connected to the political ideals of a liberal community[139]. The extent to which there is a shift in these positions I leave to others; our

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[135] Davidson "On the Very Idea of a Conceptual Scheme," in *The Essential Davidson* Ed. Ernie Lepore and Kirk Ludwig (New York: Oxford University Press, 2007).

[136] See Michael Forster's attempts to construct the strongest argument possible for the arbitrariness of grammar and how they fail, *Wittgenstein and the Arbitrariness of Grammar* (Princeton, Princeton University Press, 2004).

[137] See Hilary Putnam *The Collapse of the Fact/Value Dichotomy* (Cambridge, Mass.: Harvard University Press 2004).

[138] Frans de Waal *Primates and Philosophers* (Princeton, Princeton University Press, 2006), p. 4.

[139] Coleman and Leiter try to summarize the shift "Determinacy, Objectivity and Authority," in *Law and Interpretation* Ed. Andrei Marmor (Oxford: Oxford University Press, 1995) p. 213-5. Dworkin's later work still sits oddly between legal positivism and natural law. He writes in *Law's Empire*, n. 67 above, p. 410, that "General theories of law, for us, are general interpretations of our own legal practice." Mark Murphy holds that illustrates "Dworkin's parochialism in jurisprudence" which "is enough to disqualify him as a defender of natural law jurisprudence" and "his antimetaphysical stance in ethics is enough to disqualify him as a defender of natural law ethics." See Murphy "Natural Law Jurisprudence," *Legal Theory* 9 (2003):

focus is Dworkin's continued claims that judicial reasoning is moral reasoning, that legal questions and by extension moral ones have a right answer and that judicial review is democratically justified. Dworkin's position cannot, however, meet the challenge of the judicial review critic on all of her charges.

For Dworkin law is what his mythical judge Hercules says it is. Hercules knows the body of law and precedent and is capable of coherent and principled moral reasoning. Dworkin supports a moral reading of constitutional law where the abstract clauses of constitutions must be interpreted and applied by all citizens with the understanding that they are arguing over moral principles of respect and justice[140]. Such an understanding "brings political morality into the heart of constitutional law"[141]. The law is the best explanation political morality can provide to past institutional history. Yet for Dworkin "political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative"[142]. Dworkin argues that judicial understanding should be authoritative and that this is consistent with democracy.

Dworkin argues that when we better understand democracy, allowing judges to make moral interpretation in constitutional cases will be seen as a practical necessity of democracy[143]. In principle, there are many equally democratic ways of organizing political institutions on moral reading grounds[144] since the moral reading is a theory of the constitution's meaning not "a theory about whose view of what it means must be accepted by the rest of us"[145]. But if democracy and constitutions are better understood, we see that constitutions reveal that democracy is a "procedurally incomplete scheme of government" that cannot generate from itself tests to see if its own conditions are met[146]. For Dworkin, the fundamental point or value of democracy is embodied in what he terms the 'constitutional conception of democracy'. For this conception the defining aim of democracy is "that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect."[147] The conditions set out by this conception mean that the satisfaction of the demands for equal concern and respect are necessary for majoritarian procedures to be able to claim greater moral worth than other forms of collective decision-making[148]. It is the court's task to ensure these prerequisites are met and since

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241-267, 265.

[140] *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1996), p. 2.

[141] Loc. cit. The question here is whose conception of political morality. For a good discussion of how this is undetermined due to Dworkin's pluralistic and individualistic ('Protestant') account of the interpretation of social practices see Gerald Postema "'Protestant Intepretation' and Social Practices," *Law and Philosophy* 6 (1987): 283-319. More will said of Dworkin's interesting account of social practices in ch. 2.

[142] Loc. cit.

[143] Ibid., 7

[144] Ibid., 7.

[145] Ibid., 12.

[146] Ibid., 33.

[147] Ibid., 17.

[148] Ibid., 23.Habermas expresses Dworkin's position well, "constitutive rules that first *make a democracy possible* cannot *constrain* democratic practice in the manner of externally imposed norms" (2001), 770. Dworkin's conception of constitutional democracy makes constitutional limits not a constraint on

courts should be good at doing that, Dworkin believes himself to be defending judicial review on results as well as on procedural grounds.

He claims that interpreting moral reading is a non-partisan methodology[149]. Judges cannot read their own views into the document:

> They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the *dominant* lines of past constitutional interpretation by other judges. They must regard themselves as *partners* with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest.[150]

Judges are constrained in their decision-making because the results must fit with the structural provisions of a constitution, prior decisions and the need of partnership with their coworkers. These constraints still allow judges to seek "the best conception of constitutional moral principles" that fits historical record[151]. Courts are further constrained by having to review constitutional provisions through principles that respect rights and no policy arguments that rely on a particular conception of the general welfare[152].

So far, Dworkin seems to have done a good job responding to the critics of judicial review, but his position becomes shaky when judicial competence in moral reasoning is examined. Dworkin admits that people have to "accept the deliverance of a majority of the justices, whose insight into these great issues is not spectacularly special"[153]. Further, the above constraints do not seem to be instrumental in achieving the desired ends since "I have not devised an algorithm for the courtroom. No electronic magician could design from my arguments a computer program that would supply a verdict everyone would accept once the facts of the case and the text of all past statutes and judicial decisions were put at the computer's disposal."[154] Certainly, artificial intelligence cannot yet, if ever, reason morally. But what's to keep humans from producing different outputs from the same inputs? Waldron claims that "It is to be expected that different judges reasoning their way to their utmost ability through these questions - reasoning competently and in a scrupulously objective spirit - will come up with different answers."[155] To understand why this is the case we must understand Dworkin's account of morality.

Dworkin's account on morality is rather unusual. He claims that there are such

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democracy, but existence conditions for democracy. However, as Habermas notes (2001), 771, there is the problem that participatory rights are intrinsically valued, and the private rights are only of instrumental value to achieve equal participation. It is not clear that this makes a non-partisan conception.

149 Id. 3.

150 Ibid., p. 10 emphasis mine.

151 Ibid., p. 11.

152 *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), p. 11.

153 *Freedom's Law*, n. 144 above, p. 74.

154 *Law's Empire*, n. 67 above, p. 412

155 "Lucky in Your Judge," *Theoretical Inquiries in Law* 9 (2008): 186-216, 213.

things like moral facts that are not merely physical facts or facts about our attitudes[156]. A notion like justice, for instance, is also independent of community agreement because slavery is unjust "just because slavery is unjust."[157] Yet Dworkin does not wish to subscribe to a standard moral realist thesis, and denies that there can be any non-moral claim about the status of morality[158]. Further, he holds that meta-ethical skeptics who deny the existence of objective moral facts and argue that morality is, for instance, simply a matter of emotion, or a systematically deluded projection, are not making claims about morality from an outside perspective. These 'external' skeptics purport to stand outside a domain and evaluate all its contents from another standard, but for Dworkin that standing outside is illusory. All claims about morality are moral propositions, not neutral descriptions. Without this neutrality, there can still be skepticism, but it stands within a certain evaluative domain and must criticize with morally evaluative terms.

To speak of 'objectivity' and 'truth' in ethics is a confusion we owe to philosophers. Dworkin thinks we use:

> the language of objectivity, not to give our ordinary moral or interpretive claims a bizarre metaphysical base, but to *repeat* them, perhaps in more precise way, to emphasize or qualify their *content*. I do not believe (though some people do) that flavours of ice cream have genuine aesthetic value, so I would say only that I prefer rum and raisin and would not add (though some of them would) that rum raisin is 'really' or 'objectively' the best flavor.[159]

Words like 'objectivity' and 'truth' in moral contexts can thus be dealt with as "inflated, metaphorical ways of repeating what some of the earlier further claims says more directly."[160] Leiter calls this "obviously wrong" and thinks we should stick to the ontological reading of these types of statement[161]. But problems emerge even if we accept that Dworkin's correct for the sake of argument. If the deflation leaves a metaphor then Dworkin has the problem of explaining the status of metaphors. If 'is objectively true' is a metaphor in morals, why not in other areas like physics? What makes 'is objectively true' metaphorical and distinct from non-metaphoric predication? Without showing what's special about the meta-ethicist's language, every combination of subject, copula and predicate can be considered metaphorical, which leads to bizarre implications.

A leading account of metaphoric language has be provided by Donald Davidson. For Davidson metaphors are understood to be "*patently* false"[162] and not used to convey a meaning or a message[163] ; instead they help us "appreciate some fact--but not by standing for, or expressing, the fact"[164]. They are effective evocative tools in many domains -

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156 *Law's Empire*, n. 67 above, pp. 80-1.
157 *A Matter of Principle*, p. 138.
158 Ibid., p.174.
159 *Law's Empire*, n. 67 above, p. 81.
160 "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs* 25 (1996): 87-139, 99.
161 *Naturalizing*, n. 5 above, p.228.
162 "What Metaphors Mean," in *The Essential Davidson*, n. 135 above, p. 219.
163 Ibid., p. 222.
164 Ibid., p. 223.

handy scientific descriptions like 'strings', or a subtle prescription like 'time is money.' Not only does Dworkin indiscriminately enlarge the class of metaphorical propositions, on Davidson's plausible account of metaphors, Dworkin's attempt to deal with language of a strictly philosophical origin may slide him into an error theory where moral propositions are cognitive but all false[165].

Whatever his account of moral language turns out to be, Dworkin's internal/external criticism won't hold because unlike radical scepticism about say scientific knowledge, it's easy to find a stable second-order rational ground to judge law and morals, namely from the external standpoint of scientific norms[166]. It's from this vantage point that several key meta-ethical debates occur. For instance, naturalistic moral realists hold that moral facts can be explained in purely natural terms, while sentimentalists use evolutionary biology to explain our emotional responses and projections onto the work. Dworkin does not wish to situate himself within these debates, and as a consequence it's entirely unclear where morality is grounded and how judicial decision making is restrained on this crucial ground. As Moore aptly puts it, Dworkin is a 'queasy-', not a 'quasi-', realist about morals[167].

Without an account of how moral views are less arbitrary than predilections for different flavours of ice cream, Dworkin fails to respond to the worry about judges necessarily introducing their own personal views into the law. Mackie's argument that Dworkin's view of moral judgment would introduce "an irreducibly subjective element" into questions of law[168] remains sounds. Judges trying to follow his suggestions would not only have long task of knowing and extracting principles from all the laws of their system, but also engaging in unguided 'moral reasoning' in which they lack expertise. Without a means of adjudicating between the quality of differing reasons, different judges could claim in good faith to enforce differing 'preconditions' of democracy.

(ii) Originalism

In a letter to Judge William Johnson, Thomas Jefferson wrote that on "every question of canon construction [we should] carry ourselves back to the time when Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."[169] Originalism is a breed with many

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[165] For a more cogent defense of error theory see John Mackie *Ethics: Inventing Right and Wrong* (New York: Penguin, 1977), pp. 9-49.

[166] Michael S. Moore *Educating Oneself in Public* (Oxford: Oxford University Press, 2000) p. 286. Also, the distinction is odd in other evaluative domains. If one looks at art it seems "perfectly reasonable to present arguments against art in general: art won't cure real pain; perhaps it does foster the wrong attitudes in people. It isn't obvious, though, that such general arguments against the very existence of art can easily be transformed into internal aesthetic standards, ways of telling better art from worse art. True, art doesn't abolish the pain of the world, but that won't tell us anything about the relative merits of Schönberg and Stravinsky." Raymond Geuss "Adorno and Berg" in *Morality, Culture and History* (Cambridge: Cambridge University Press, 1999), p. 126.

[167] Ibid., p. 43.

[168] "The Third Theory of Law," *Philosophy and Public Affairs* (1977) 9. See also Leiter (2007), p.253.

[169] Thomas Jefferson to Judge William Johnson, 12 June 1823, in *The Writings of Thomas Jefferson*, vol.

is vague and controversial. Hart argues that it is desirable to have judges exercise discretion in penumbral cases because they can make law consistent with existing rules and limit transaction costs of deferral to legislatures to settle vagueness[191]. Waluchow argues that Hart's argument should be extended to cover judicial discretion about applying laws where the core meaning is clear, but the law is absurd, unjust or runs counter to the law's purpose. This justificatory line should not be forgotten even though it will not be further discussed until chapter three.

In his more recent work on adjudication, Waluchow is responding to Waldron's arguments that the practice of judicial review is unjustifiable or unjustified. Waluchow makes several responses, some similar to the ripostes to Waldron surveyed above, but his most novel contribution to the debate about adjudication is also underdeveloped[192]. Waluchow argues that judicial review can be democratically justified because courts can decide disputes by looking at a community's constitutional morality (CCM) that embodies that community's authentic moral commitments. This indirect justification presupposes (minimally) that there is such a constitutional morality, that is knowable by judges in circumstances similar to current institutional contexts in common law systems, and that legislatures are likely to enact laws that run counter to the constitutional morality. The last claim is certainly the easiest to justify and thus I will not much consider it in this thesis. No doubt one knows of numerous historical cases where legislators passed a partisan bill that much of their community didn't support - let alone after they had time to achieve reflective equilibrium!

The rights to which Charters refer are best viewed as rights of political morality established within the community's constitutional morality. The community can be wrong about what its constitutional morality requires, judges may be in a better position to obtain a correct answer about the requirements, and judges are right to enforce the authentic commitments of the people since that respects democratic principle[193]. A CCM can be ascertained via its various social forms and practices, to which the community has committed itself and have in some way been drawn into its law by their rule of recognition[194]. A constitutional morality is an intersubjective construct of legally entrenched moral principles broadly accessible to legal minds.

The evidence obtained through law and social practices, however, may not be the CCM itself. The authentic beliefs of the community are those they find truly acceptable or "*would* find acceptable if we were better informed about, or appreciative of, the nature and consequences of our proposed actions"[195]. The 'would' indicates that authenticity is partly counterfactual. Authenticity allows for not just the considered reason we had for action, but the one we would have had if we were better informed of both the nature of our actions and their consequences. Even if judges achieve reflective equilibrium after

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[191] A similar case about Hart's views of open texture being partly a policy argument about the desirability of judicial discretion is made by Brian Bix "H.L.A. Hart and the 'Open Texture' of Language," *Law and Philosophy* 10 (1991): 51-72.

[192] He described his notion of a community's constitutional morality as "admittedly sketchy", *Common Law,* n. 3 above, p. 228.

[193] Ibid., pp. 219-220.

[194] Ibid., p. 227.

[195] Ibid., p. 194.

thoroughly comparing and weighing cases and principles they still only *might* "be *enforcing*, not *thwarting*, the community's very own political morality!"[196] The might is due to the lack of ordering higher-order ranking principle in the contingently constituted moral system that may allow for subjective judicial weighting, and the legal incorporation requirement may mean that judges have a more limited norm pool to draw upon than citizens reflecting on their moral commitments with constitutional amendment powers. The potential for errors in reliably ascertaining and applying a constitutional morality will be discussed in chapters 2 and 3 respectively.

It must be noted at this point, that the common law theory of judicial review responds both to the problems raised by the judicial review critic and our descriptive constraints. The undertheorized consensus on political morality acknowledges both disagreement and consensus. A constitutional morality is identifiable and seems to limit judicial subjectivity in deciding cases, and both its ascertainment and application are tasks well suited to judges versed in drawing principles from particular cases and speculating about the consistent effects of rules to future cases. For the moment, the recommended reforms appear limited, extending the set of legal reasons, and the means are geared to justifying the ends of enforcing the views of the people not the judiciary. This is not to say that it's fully democratic; there is a *prima facie* absence of participation in collecting the norms for judicial reflection that deserves further attention[197].

It is worth closing with a rich objection to this whole approach that should stay in the back of the reader's mind as we explore CCM adjudication in the next two chapters. We must be careful to avoid the mirage of some liberal constitutional thinkers who assume a rich moral consensus underlying a pluralistic society. We must also acknowledge that something like that vision is our aim, but we must earn it. Raz writes that a court 'finding' the law is perhaps "harmless rhetoric if understood as such.", but he warns of the tendency to slide into a literal interpretation of such rhetoric, which:

> [I]s only made possible if one is prepared to join the courts in endorsing two really harmful myths. One is the myth that there is a considerable body of specific moral values shared by the population of a large and modern country. The myth of common morality has made much of the oppression of minorities possible. It also allows judges to support a partisan point of view while masquerading as the servant of a general consensus. The second myth is that the most general values provide sufficient ground for practical conclusions. This myth holds that, since we all have a general desire for prosperity, progress, culture, justice, and so on, we all want precisely the same things and support exactly the same ideals, and that all the differences between us result from disagreements of fact about the most efficient policies to secure the common goals. In fact, much disagreement about more specific goals and about less general values is genuine moral disagreement, which cannot be resolved by appeal to the most general value-formulation which

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[196] Ibid., p. 230.

[197] See Christine Sypnowich "Ruling or Overrule? The People, Rights, and Democracy," *Oxford Journal of Legal Studies* 27 (2007): 757-774, 767.

we all endorse, for these bear different interpretations for different people.[198]

If moral consensus is too thick it's false and excludes, and if it's too thin then it fails to guide decisions and our motivation to find it goes unsatisfied. Navigation between these two poles requires great care and this thesis is an attempt to chart those waters.

5. A Sketch of Things Ahead

Having surveyed some of the most prominent theories of interpretation and briefly argued for the superiority of Walcuhow's account of adjudication in responding to Waldron's criticism about democratic legitimacy and judicial competence in rights adjudication, we can now turn to extending Waluchow's framework and assessing its adequacy in performing the legitimation task. In the next chapter, I offer a fuller account of constitutional moralities and analyze the epistemic problems with judges' ascertaining a community's constitutional morality within the limitations of the common law system. Waluchow's arguments claim to vindicate a central practice of liberal democracies from many of the trenchant criticisms outlined above by making a few neat distinctions and taking away the ideological muddle for and against through which we see constitutions. We will assess its success on that score shortly.

[198] Raz "Legal Principles and the Limits of Law" in *Ronald Dworkin and Contemporary Jurisprudence* ed. Marshall Cohen (Rowan and Allanheld: Totowa, NJ, 1984) p. 78. A concrete illustration of these dangers is the Nazi use of 'common law' and judicial discretion guided by the needs of the 'Volk' see William Scheuermann *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Mass.: MIT Press, 1994), p. 34.

Chapter 2:
Consensus from Meta-Ethical Babel?
Ascertaining a Constitutional Morality in a Common Law System

"But ordinary moral discourse, as I hear it, is a meta-ethical Babel."
- Jeremy Waldron

Introduction

Over forty years ago H.L.A. Hart wrote that the question of whether morality had been influenced by law had scarcely been addressed let alone answered adequately[199]. The question has since been taken up to some degree[200], but there is still much work to be done on this neglected issue in the debates about the relationship of law and morality. It is my hope in this essay to illustrate some of the mediations salient to these debates through a discussion of constitutionalism. My attempt to outline a plausible conception of what Waluchow calls a community's constitutional morality (CCM), however, is motivated primarily by a desire to show how such a notion mitigates Waldron's criticisms of judicial review. Waluchow defines a CCM as "the set of moral norms and considered judgments properly attributable to the community as a whole as representing its true moral commitments" and this set is in "some way tied to its constitutional law and practices"[201]. To some such an entity may sound like a refined Trojan Horse still hiding a bad Rousseauian metaphysics of the general will, but it is explicable in the parsimonious confines of a naturalistic framework and the strictures of methodological individualism. While I defend this notion as an empirically plausible meta-ethical description of political morality in constitutional states, providing certain facts obtain about public knowledge, I argue there are good reasons to think that the fact-finding powers in common law systems leave it beyond reliable judicial knowledge. Thus the support it provides our justificatory project requires further examination of its ability to guide decisions, which will be taken up in the next chapter.

2. How Law Mediates Morality

(i) Waldron's Argument that Realism and Objectivity are Irrelevant to Adjudication

As I noted in section three of the last chapter, there have been many ripostes to Waldron's critique of judicial review. Many focus on the untenability of his account of deep disagreement, since if it is as radical as he presents then the procedures he advocates couldn't be supported without the substantive agreement he disclaims, thus he is either a partisan for a certain substantive view or caught an infinite regress. That line of argument is sound, but the focus upon it in the literature underplays the interesting meta-ethical

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[199] *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963) p. 1.
[200] Tony Honoré "The Dependence of Morality on Law," *Oxford Journal of Legal Studies* 13 (1993): 1-17.
[201] *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007), p. 227.

argument Waldron makes in order to support legislative supremacy. For instance, Andrei Marmor dismisses the value theory-focused middle third of *Law and Disagreement* as "somewhat of a digression"[202] from Waldron's arguments about the wisdom of the legislature and recommendations for making its democratic procedures the means to settle questions of the Right and the Good. Waldron's major premises against judicial review that rights claims are subject to reasonable disagreement, however, largely rests on the arguments in that part of the book.

It is one of Waldron's more provocative claims that even if moral realism were true, it is irrelevant to judicial decision-making because there is no agreed upon means for accessing this hypothetically objective realm and those who disagree with a court's ruling would be disrespected by their lack of participation[203]. Waldron's position is not unlike the startling claim of the French scientist and philosopher Julien de La Mettrie who argued that even if we could know that God exists, the answer to the question is irrelevant to human happiness. La Mettrie's argument flounders because in order to know that a certain ontological question is irrelevant one must presupposes some knowledge about the content of that answer, which he inconsistently denies the possibility of knowing. The argument Waldron makes about objective moral norms does not commit such a fallacy and is also difficult to undermine because he starts from strong positions in current metaphysics and meta-ethics.

It's hard to come up with moral realist accounts that are consistent with the naturalistic ontology modern science has given the philosopher. To preserve the universal and convention-independent norms of morality seems to require the postulation of what John Mackie called queer entities[204]. If one accepts the argument that scientific ontology liquidates the objectivity of morality then the moral realist is left claiming that the objective norms are supernatural, which makes them impossible to know by most epistemologies and a physicalist account of causation[205]. By treating the sensation of being struck by a sense of justice from beyond with objective prescriptive force, one validates anyone's experiences of this type, even if delusional, and thus the door is open to far too many ontologically-suspect entities that modern science has brushed aside. Those who accept that science is the best game in town when it comes to knowledge and don't want to weaken its fragile achievements are in a tough place if they wish to retain objective moral claims. It seems that one is left looking for some sort of moral stuff with the factual status of particles and space-time, which Ronald Dworkin calls "morons."[206] As we shall see, however, there are ways of talking about moral objectivity without

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[202] "Review of Waldron," *Ethics* (2002) 410.

[203] *Law and Disagreement* (Oxford: Oxford University Press, 1999) pp. 164-187. For a case against using natural law interpretation in American constitutional interpretation see Walter Berns "The Illegitimacy of Appeals to Natural Law in Constitutional Interpretation," in *Natural Law, Liberalism and Morality* Ed. Robert George (Oxford: Oxford University Press, 2001), pp. 181-194.

[204] Mackie *Ethics: Inventing Right and Wrong* (New York: Penguin, 1977), pp. 38-42.

[205] Jaegwon Kim "Moral Kinds and Natural Kinds: What's the Difference for a Naturalist?" *Philosophical Issues* 8 (1997): 293-301.

[206] "Objectivity and Truth You'd Better Believe It," *Philosophy and Public Affairs* 25 (1996): 87-139, 126. For a thorough and thoroughly devastating critique of Dworkin's account of objectivity see Leiter *Naturalizing Jurisprudence* (New York: Oxford University Press, 2007) pp. 225-255

committing oneself to the stranger modes of realist ontology, but before considering such possibilities we need to understand Waldron's argument and its context.

In twentieth century philosophy, suspicion about morality ceased to be a marginal view of eccentric Germans like Marx and Nietzsche and became a common position in academic philosophy. Wittgenstein helped inaugurate analytic philosophy's suspicious attitude toward the cognitive status of morality with his picture theory of meaning. According to his early account, language was meaningful only because it reproduced the basic structure of reality in its logical form. Unfortunately, most sentences in natural language do not reproduce this structure; only factual propositions and tautologies are properly sensical, and all the important propositions of morality, aesthetics and metaphysics are, strictly speaking, nonsense. Wittgenstein later repudiated much of this theory, but by then it had mutated into the verificationism of the logical positivists, which in turn begat Quinean naturalism. Logical positivism's theory of meaning reduces all meaningful discourse to truth-functional propositions that are either tautologies or empirically verifiable propositions[207]. Waldron's claim rests on this background so it is worth exploring briefly the logical positivist flavour of his argument.

Waldron's argument echoes the critique of natural law by the Scandinavian legal realist and logical positivist Alf Ross. After calling natural law a harlot because it is at the disposal of any ideologue who wishes to use the label, Ross continues:

> And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition. Cannot my intuition be just as good as yours? Evidence as a criterion of truth explains the utterly arbitrary character of the metaphysical assertions. It raises them up above any force of inter-subjective control and opens the door wide to unrestricted invention and dogmatics.[208]

Natural laws, classically conceived as the community-transcendent norms immanent in the book of the world or human nature, are undiscovered and unlikely to exist according to Ross's methodology. The non-tautological claims of natural lawyers are largely unverifiable and too often they claim to be known by mysterious means. As the rebellious Antigone remarks of the laws that justify her transgression of King Kreon's orders, "They are not of yesterday or to-day, but everlasting/though where they came from, none of us can tell."[209] Even sympathetic abolitionists were mystified as to how John Brown knew it was God's will that he use swords to lop off the heads of sleeping whites one fateful night in Harper's Ferry, Virginia.[210]

The position that Ross and Waldron flog is not only that of the intuitionist natural lawyer, but the moral realist's. In general, a realist is one who claims that morality is objective, where objectivity means there are moral facts, though not necessarily in a

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[207] On how this applies to ethics see A.J. Ayer *Language, Truth and Logic* (Lodon: Gollancz, 1935) pp. 22, 102-108, esp. pp. 104-107.

[208] *On Law and Justice* tr. Max Knight (Berkeley: University of California Press, 1958), p. 261.

[209] Sophocles *Antigone* lines 495-6, p. 138.

[210] For a nice factual, but too uncritical account of Brown see David Reynolds' *John Brown: Abolitionist* (New York: Vintage, 2005).

mind-independent sense[211]. Waldron holds that "there is no privileged, easy, or uncontroversial access" to moral facts, if they exist, for unlike objectivity in scientific domain there is no method or agreed upon means of solving dispute about moral values.[212] Curiously, moral anti-realists whose position is constituted in large part by their rejection of moral realism are in the same boat of unverifiable claims. The abstract problems of moral epistemology are given concrete urgency when we recall that constitutional law contains moral language in its rights provisions. How are we to apply these provisions if we can't be sure of the nature of these rights?

For Waldron there are three major worries about judicial application of moral provisions of constitutional law. The decisions could be unpredictable, unreasoned and arbitrary. Both the moral realist and the anti-realist will contribute to making these three features characteristic of constitutional law. Anti-realists, for instance, may solve cases according to their feelings of what is "cruel and unusual." Not every judge will have the same feelings so cases are not only clearly not grounded in reasons, but are dependent on the vicissitudes of the contingent responses of different personalities[213]. The realist judge may appear to have the edge on the anti-realist because at least her decisions would be reasoned, but for Waldron that edge is illusory. At best the realist judge has her opinion because "The truth of moral realism (if it is true) does not validate any particular person's or any particular judge's moral beliefs. At best, it alters out understanding of the character of a moral disagreement without moving us any closer to an understanding of who is right and wrong."[214] An ontology without an epistemology yields arbitrariness whether one denies or affirms the existence of the relevant entities. Therefore, judicial review cannot be supported on the grounds that it does justice or protects the real nature of rights. Rather, "The case for judicial review must be won or lost on the moral and political merits of the matter, on the basis of moral arguments about fairness, justice, and democracy."[215] All of which are subject to deep disagreement.

Waldron is likely correct that the debate should be held primarily on those grounds, not meta-ethical ones. However, since the above argument about the nature and accessibility of moral norms plays a crucial role in Waldron's argument it requires a response. The defender of judicial review needs to show that there is a way of talking about moral provisions of constitutions that have a determinate content, which judges can reliably access and have an expertise in applying. Fortunately, there is a sensible way of talking about moral objectivity that is accessible to judicial reasoning, which Waldron does not consider. The account is not ontologically extravagant and makes better sense of constitutional adjudication than other meta-ethical positions. We will turn our attention to

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[211] *Law and Objectivity,* p. 164.
[212] Ibid., p. 178.
[213] Ibid., p. 175.
[214] Ibid., p. 181.
[215] Ibid., p. 185. The moral realist Michael S. Moore responds that his version of the theory is immune to Waldron's criticisms because his "non-foundationalist epistemology differs not at all from the non-foundationalist of those with quite different moral metaphysics." Moore's coherentism about knowledge makes it unclear, however, how his account of the nature of moral norms would make any difference since they could be revised away to cohere with the rest of his beliefs. See *Natural Law* Theory Ed. Robert George (Oxford: Oxford University Press, 1992) p. 228.

it now.

(ii) Jurisprudence, Morality and Intersubjectivity

Despite Hart's noting the underanalyzed effects of law on morality, he held that jurisprudents ought not get drawn into meta-ethical problems. In the Postscript to *The Concept of Law*, Hart writes that "legal theory should avoid commitment to controversial theories of the general status of moral judgments"[216]. Hart makes this remark in the context of an intra-positivist dispute, but the way much analytic jurisprudence is often practiced one might think it a general edict. The stricture was partly meant to show how inclusive legal positivism, the thesis that legal systems can include moral conditions in tests of legal validity, is a difficult, though right, line to defend. He writes that:

> a moral test can be a test for pre-existing law only if there are objective moral facts in virtue of which moral judgments are true. But that there are such objective moral facts is a controversial philosophical theory; if there are no such facts, a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion in accordance with his best understanding of morality and its requirements and subject to whatever constraints on this are imposed by the legal system.[217]

This argument is consistent with Waldron's above. Without something objective to guide decisions judges are left with their discretion and their own account of the nature of morality. Hart thinks legal philosophers should leave the meta-ethical question about objectivity open[218], but while I won't answer that question directly neither will I strictly follow Hart's "particular, perhaps idiosyncratic meta-jurisprudential scruples"[219].

That is not to say this is an essay on the general status of morality. Rather, I seek to show how considerations of some legal practices lead to descriptions with meta-ethical implications. Jules Coleman notes that moral or justificatory questions can "grow out of

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[216] *The Concept of Law*, 2nd ed. (Oxford: Clarendon, 1994), pp. 253-4.

[217] Ibid., p. 253.

[218] Ibid., p. 254.

[219] Leiter *Naturalizing Jurisprudence*, p. 128. I think it's fair to say that a lack of meta-ethical argument has led to some confusion in the inclusivist/exclusivist positivism debates. For instance, Raz assumes without argument that morality "applies universally to all agents capable of understanding it" see "Incorporation by Law," *Legal Theory* 10 (2004): 1-17, 2. How do we know that morality has universal jurisdiction and its reasons are available to all rational humans? Or that these reasons are "true and valid considerations" ibid., 4, and that the class of moral reasons is not a system of rules ibid., 5, or a seamless web ibid., 8? From these undefended assumptions, Raz argues against the inclusive positivist theory of law's incorporation of morality, concluding that "law cannot empower morality" and that the exclusion of morality is the transcendental condition to law's incorporation of morality ibid, 7-8. We get a similar assumption in Marmor that "constitutive conventions have no role to play in determining that we should act according to moral reasons" *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001) p. 51. Marmor makes the usual assumption that moral reasons are convention independent, but without argument his and Raz's exclusive positivist arguments are vulnerable to accounts like mine that do not characterize morality in this way and can show that there are actual and possible systems that make an intersubjective constitutional political morality an existence condition for law and part of the test of legal validity.

the explanatory project as it reveals the abstract principles in greater specificity and concreteness."[220] Coleman's descriptive work on tort law illustrates this point, since he argues that the practice of tort law is best explained by the principle of corrective justice. Analogously, justificatory questions emerge when we look at common law constitutional systems and see moral principles objectified in a constitutional document made operational in mind-independent government institutions.

It is a neglected fact that political moralities in liberal constitutional states are in an important sense social constructs that have an objective form through their legal dimensions. Constitutions come into being through ratification votes by people deciding to accept or reject the contingently assembled contents that constitutional authors have produced. No doubt many provisions are written in moral language, and the common understanding of such predicates may be that they are universal standards, thus ratifiers have moral realist intuitions about the rights they are entrenching. Future generations who amend the constitution by adding new rights provisions might be of a similar mind. None of this, however, guarantees that these values are in fact real in the realist's sense, but they do have an objective form in legal sources that citizens can use as a publicly-recognized metric for moral evaluation.

The possibility of amendment shows the incompleteness, or in the cases of retraction, incorrectness, of the set of original provisions of a political morality. So does comparison with other countries with constitutional bills of rights. One liberal constitutional system might protect property rights in its fundamental charter and another one might not. A subset of entrenched moral provisions might correspond to moral reality, if for the moment we allow that moral realism is true. But such correspondence would be contingent, and the truth of moral realism is not our main focus and can be placed on the backburner because its importance in justifying constitutional rights is not primary. In democratic states, any account of the justification of constitutional rights must include their acceptance by the population as a large part of their authority. Many constitutional rights are entrenched through super-majoritarian voting procedures after being rationally debated by the populace. The entrenched moral provisions of a constitution form a system. That moral system is a species of political morality known as a community's constitutional morality. In a constitutionalist community, political morality is fused with political institutions through which it is expressed and realized.

A strong candidate for John Rawls's greatest insight is his thought that substantive moral theory can proceed without agreement on the foundation of ethics[221]. In his later work, where he moved away from the idealized contractarianism of his early thought, Rawls argues that the conception of justice of contemporary liberal societies was constituted by an 'overlapping consensus.'[222] Such a conception is political not metaphysical. It is political in the sense that the conception of justice "must allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable,

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[220] *The Practice of Principle* (Oxford: Oxford University Press, 1999), p. 7.

[221] "The Independence of Moral Theory," in *Collected Papers* Ed. Samuel Freeman (1999) pp. 286-302. See also *A Theory of Justice* (1971), pp. 51-60 where he suggests searching for foundations of ethics may be premature.

[222] "Justice as Fairness: Political not Metaphysical," *Philosophy and Public Affairs* 14 (1985): 223-251.

conceptions of the good affirmed by the members of existing democratic societies."[223] Pluralism is a fact of modern democratic states so a general metaphysical conception cannot ground a public conception of justice because there is no consensus on those doctrines. What is needed, and arguably present, is a conception of justice upon which all reasonable people will agree despite their differing comprehensive philosophical views.

For Rawls the construction of such a conception starts with the "provisional fixed points" most individuals agree on as a common ground[224]. For instance, many people accept some forms of religious tolerance and reject slavery. From these fixed point we then look "to our public political culture itself, including its main institutions and the historical traditions of their interpretations, as the *shared fund of implicitly recognized basic ideas and principles*."[225] The ideas and principles drawn from these public resources are then to be balanced against our strongly held provisional fixed points. After due reflection, some might be adjusted in weight or dropped to achieve a coherent set of beliefs and reflective equilibrium is achieved[226]. Nothing new will necessarily be generated through such a procedure and the end results "may only articulate familiar intuitive ideas and principles so that they can be recognized as fitting together in a somewhat different way than before."[227] But we will have achieved a publicly recognized working agreement that is not generated by coercion or self-interest. We needn't worry about the particular results Rawls achieves or the normative assumptions he makes about what he *claims* are our intuitions about rationality, personhood and justice. In the current era of experimental philosophy where more philosophers are actually asking people questions about their intuitions, we should wait for some empirical results before we claim to have intuited everyone's intuitions. The result of the Rawlsian procedure is, however, the general sort of underlying consensus I would argue may be present in a constitutional regime.

One might object at this point in calling such an intersubjectively constituted doctrine a 'political *morality*'. While it might offend certain realists, this usage is defensible both lexicographically and philosophically. Peter Railton notes that:

> We speak of morality descriptively when we try to give an empirically accurate account of certain norms and notions current within a given society, the extent to which they are observed, the ways they are taught and sanctioned, etc. We speak of morality normatively when we ask whether actions, practices, and so on are indeed right or wrong, better or worse, appropriate or inappropriate.[228]

Hart makes a similar distinction between positive and critical morality[229]. Positive morality is the "morality actually accepted and shared by a given social group" and

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[223] Ibid., 225.
[224] Ibid., 228.
[225] Loc. Cit. emphasis mine.
[226] *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) pp.48-51.
[227] "Justice as Fairness," 229.
[228] *Facts, Values, and Norms: Essays Toward a Morality of Consequence* (New York: Cambridge University Press, 2003) p. 359.
[229] *Law, Liberty, and Morality*, p. 20.

critical morality is comprised of the general principles by which given social institutions and relations are criticized[230]. Using the term 'morality' to refer both to critical principles and social mores might be potentially confusing to some, but certainly we've become accustomed to hearing the sociologist's use of 'morality' to refer to a society's shared code of proscriptions, prescriptions and obligations that are either tacit or explicit. Morality is often distinguished from such customary social practices since many consider morals to be of universal scope and not existentially dependent on relative and contingent agreement like the variable rules of etiquette. I leave it an open question of whether this potentially ambiguous usage of "morality" should ultimately be abandoned. Perhaps it be resolved if some form of moral realism or moral nihilism is proven true, and the term will collapse univocally into either the critical or the positive pole. But these issue will probably long remain unsettled.

The ontological debate about true moral values can be sidestepped since the object for which I claim existence is socially constructed. A community's constitutional morality is a construct that oscillates between conventional and critical morality. Constitutional morality is irreducible to conventional morality. Conventions can be dominated by an ephemeral majority who nonetheless make marks on the constitutional morality. A CCM can be identified by the supple reasoning of the common law jurist who analyzes statutes, precedents, and social practices.

I also leave aside the meta-ethical question concerning the sufficiency of intersubjective agreement for normativity (beyond the sociological description where an internal point of view is adopted). Instead, I aim to show how in constitutional systems law is a medium of moral incorporation and then recognition and orientation of citizens towards shared public values. My account is neutral towards meta-ethical relativism and realism. The values entrenched can be the idiosyncratic beliefs of particular community that by chance correspond to the good, should it exist, but again I leave that question aside. Finally, I'm not making anything like the converse relativist point that:

> our maturation has consisted in the gradual realization that, if we can rely on one another, we need not rely on anything else. In religious terms, this is the Feuerbachian thesis that God is just a projection of the best, and sometimes the worst, of humanity. In philosophical terms, it is the thesis that anything that talk of objectivity can do to make our practices intelligible can be done equally well by talk of intersubjectivity.[231]

(iii) Theoretical Constraints: Naturalism and Methodological Individualism

As I said in the introduction, there is a tendency for people to reduce any talk of consensus to some bad metaphysics of the general will. In this section I wish to briefly outline two strictures that should undermine that critique at the outset.

Naturalism's core methodological principle is "to defer to whatever ontology and

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[230] Loc. Cit.

[231] Richard Rorty "John Searle on Realism and Relativism," *Truth and Progress: Philosophical Papers, Volume 3* (Cambridge University Press, 1998) p. 82.

epistemology fall out of successful scientific practices."[232] That deference comes in two varieties. First, there is methodological naturalism which views philosophy as continuous with empirical inquiry in the sciences in terms of method. And then there is substantive naturalism, which is an ontological position that only natural, or physical, things exists[233]. Both of these views are subject to challenge. The ontology of the physical and biological sciences is diverse, and if we consider the social sciences it is even more so because we to have explain things like hyperinflation.[234] Further, methodologically, there is a great variety in methods employed throughout the special sciences[235]. That said we should follow the core restraint of naturalistic philosophy and not postulate any entities that successful science rules out. Thankfully, psychology cannot get by without relying on intentional categories so we are licensed to use them.

We ought also to follow the social scientific constraint of methodological individualism. This principle holds that "all social phenomena - their structure and their change - are in principle explicable in ways that only involve individuals - their properties, their goals, their beliefs and their actions."[236] Any collective concepts, for instance, a community's constitutional morality, thus ought to be translatable into individual terms. The principle is motivated by need to reduce time and space between cause and effect in order to avoid incorrect explanations, i.e. confusing explanation and correlation or confusing explanation and necessitation.

With these constraints in mind we will therefore be looking for an account of a constitutional morality where "moral facts are reducible to empirical facts about what people in the group believe" so we need not presuppose "the existence of any mysterious ontological entities that cannot be accessed through empirical means."[237]

3. The Constitution of a Constitutional Morality. Collective Intentions and Collective Action: Capturing the Living Tree in Motion

If we're to give an account of the nature of constitutional moralities then we must engage not simply in reconstruction but construction. Waluchow admits his account is 'sketchy'; in this section I attempt to fill in the sketch. My attempt is not one that claims fidelity to authorial intent, but rather works backwards to what the object must be like from a few signposts while using a few methodological constraints outlined above. I assume methodological individualism, and that morality can be spoken of as arising from social facts and intentional states. Again, that usage may be more sociological than some philosophers are used to, but if it displeases then a non-pejorative sense of 'ideology' may be substituted.

Waluchow argues that the rights to which constitutional norms refer are "best viewed as rights of political morality established within what we'll call the 'community's

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[232] *Naturalizing Jurisprudence*, n. above, pp. 3-4.
[233] See Leiter "Naturalism in Legal Theory" Stanford Encyclopaedia.
[234] *Deconstructing the Mind* (New York: Oxford University Press, 1996) p. 197.
[235] Ibid., p. 199.
[236] Jon Elster *Making Sense of Marx* (1985), p. 5
[237] Kenneth Einar Himma "Incorporationism and the Objectivity of Moral Norms," *Legal Theory* 5 (1999): 415-434, 425.

constitutional morality'"[238]. The community can be mistake about the requirements of their morality, and judges can correctly, or simply better, ascertain the requirements of the community morality in particular cases. Judges are required by their institutional role within a constitutional system to impose their judgment of the CCM's requirements, and in doing so they are not imposing personal moral views. A CCM thus crucially rests on a distinction between moral opinions and true moral commitments[239]. True moral commitments are those that have emerged after the test of reflective equilibrium where values, principles and judgments about particular cases have been made a coherent set. The word 'true' here only means the authentic commitments of the community and does not imply any stance on moral realism. Moral opinions are knee-jerk moral judgments, not the product of that skilful coherence procedure, though they might accord in some cases.

A community might agree on conclusions without the work of reflective equilibrium, or its true moral agreement might only emerge after evaluative dissonance has been removed by a reflective equilibrium test; Waluchow means CCM to refer to both possibilities[240]. When the authentic commitments of the community only emerge after reflective equilibrium, then the distinction between moral opinions and true moral commitments does most of its work. The considered opinions of the court can have an educative function to show the general public to what it is truly committed.

My case for the objectivity of CCM rests on five sources as sites where the existence and content of a CCM can be ascertained: ratified constitutions, ratified amendments, statutes, precedents and their related principles and what Waldron calls legal archetypes. I will not investigate whether what Waluchow terms "social practices" can be a source for CCMs because I think the above legal sources provide plausible defense of the use of the concept of a CCM to explain and, in part, to justify judicial review. That said, the indeterminacy problems caused by the moral principles potentially disclosed in those sources may be mitigated if a defence of the social practice source can be made. I say mitigated and not solved because one assumes that social practices would be sources for evincing similar moral principles as the aforementioned sources, and thus their force in judicial deliberation would be an increase in a type of evidence making a determinate outcome more likely, but not necessary, and they may make it more uncertain. The indeterminacy of moral principles in a conventionally constituted objective morality like a CCM is endemic due to its conventional sources, but these issues will be discussed in greater detail in the next chapter.

(i) Community Defined

Prior to reflection, the term 'community' seems rather clear, but one quickly realizes that many usages and philosophical conceptions are shot through with moralistic evaluations. In her neo-Marxist analysis of the uses and abuses of the notion of community in contemporary American society and politics, Miranda Joseph notes the instability of 'community"s meaning. It is invoked by a variety of different groups who all

[238] *Common Law Theory*, p. 219.
[239] Ibid., p. 223.
[240] Ibid., p. 222.

try to appropriate its often positive, if unclear, connotations:

> Community is almost always invoked as an unequivocal good, and indicator of a high quality of life, a life of human understanding, caring, selflessness, belonging. One does one's volunteer work in and for 'the community'. Communities are frequently said to emerge in times of crisis or tragedy, when people imagine themselves bound together by a common grief or joined through some extraordinary effort. Among leftists and feminists, community has connoted desired ideal of cooperation, equality, and communion.
> Because it carries such positive connotations, community is deployed by any and everyone pressing any sort of cause.[241]

While the use of the term is often positive this is not always in the case.

Roberto Unger writes both that a "stable and authoritative sharing of values" characterizes "forms of hierarchical community" and that community is "the political equivalent of love."[242] Alasdair MacIntyre holds that the "notion of the political community as a common project is alien to the modern liberal individualist world."[243] In a vein that combines both the above authors, Robert Paul Wollf writes that there's a "need for a new philosophy of community"[244]. Such remarks tempt one towards Stephen Holmes's summation of this kind of rhetoric Stephen Holmes, "Communitarians invest this word with redemptive significance. When we hear it, all our critical faculties are meant to fall asleep. In the vocabulary of these antiliberals, 'community' is used as an anaesthetic, an amnesiac, an aphrodisiac."[245]

A more fruitful and descriptive definition is provided by Max Weber. He defines a political community as a group that "possesses value systems ordering matters other than the directly economic dispositions of goods and services."[246] Weber, unfortunately, does not dwell on the content of those value systems, and instead focuses on the formal commonality of how political communities dominate a particular territory in an orderly manner. The definition does adequately describe what we are looking for. Citizens in the modern state are numerous and do not know each personally, but they are united by common language and ideology, even if the latter commonality is fairly thin.

The term "community" in "community's constitutional morality" may appear to have a universal scope, but the communities in question are recent on the stage of world history. Communities with written constitutions that entrench limited government through bills of rights are distinctly modern achievements and thus the communities that have constitutional moralities are few. The proliferation of constitutions and constitutionalism in the late 20th and early 21st century (South Africa, Iraq, Venezuela ...) has increased the number of possible communities with constitutional moralities and

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[241] *Against the Romance of Community* (Minneapolis: University of Minnesota Press, 2002) p. vii.
[242] *Knowledge and Politics*. (New York: Free Press, 1975) p. 275, 171 and 261.
[243] *After Virtue* (1981) p. 156.
[244] *The Poverty of Liberalism* (1968), p. 161.
[245] *The Anatomy of Antiliberalism* (1993), p. 177.
[246] *On Law in Economy and Society* Ed. Max Rheinstein. Tr. Edward Shils and Max Rheinstein. New York: Touchstone, 1954, p. 339.

has underscored that this way of organizing society is not necessarily a purely Western one. A community with a constitution comprises all citizens within a state. These are large masses of people who could not possibly all know each other and thus their unity into a community is in some sense imaginary. As Benedict Anderson has neatly phrased it, "all communities are larger than primordial villages of face-to-face contact (and even perhaps these) are imaginary. Communities are to be distinguished, not by their falsity/genuineness, but by the style in which they are imagined"[247]. Constitutional communities are unified in large part by their shared principles of political morality, but we must not imagine too thick a consensus and fall prey to the some of the above treacle.

(ii) Skepticism about Consensus

Under a section with this heading one might cite the learned critics of consensus and general wills like Schumpeter, Shklar and Waldron, but I feel that a fact is here more potent than arguments. A poll by the American Bar Association taken to mark the two hundredth anniversary of the U.S. Constitution's ratification showed that only 33% of Americans can identify the Bill of Rights[248]. This distressing fact should give us pause before we can claim that citizens even know their communal political morality, let alone all agree to it. Citizens are not only mistaken about the implications of their political morality, but some of its basic contents. Perhaps this a singular fact about American political life or the result of a systematic error in polling data. But if this sort of information is true about multiple regimes then we must seriously question whether the norms constitutional judges rely upon have a democratic pedigree.

(iii) Sources of a Constitutional Morality

a) Constitutional Politics

Although much of his work on constitutionalism is mostly of relevance only to the American system, Bruce Ackerman's distinction between normal and constitutional politics may illuminate something important about general constitutionalist practice. Ackerman argues that constitutional systems often have "dualistic constitutions" which have a two-track lawmaking system[249]. The lower law-making track encompasses ordinary statutory law passed by a legislative body consistent with democratic pluralism; the higher track is for revolutionaries who want to change the governing norms or principles of their society by amending the basics of constitutional law that limits the lower track and the "new principles will serve as higher law and will trump the outcomes of normal politics"[250]. Eras of constitutional politics are usually marked by increased civic mindedness and principled debate and discussion. If there is sufficient agreement by an organized group then they propose legal changes. After drafting the new law they must

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[247] *Imaginary Communities*, p. 15
[248] "Poll Finds Only 33% of Can Identify Bill of Rights" December 15, 1991, *The New York Times*.
[249] *The Future of Liberal Revolution*, (1991) p. 14.
[250] Loc. Cit.

defend their proposed normative additions and alterations to the larger populace, instead of violent vanguard parties who force the majority to recognize the falsity of its consciousness or attack dissenters. The public must come to support their ideas and with a critical self-consciousness make them part of the community's most basic law.

This description of constitutional adoption and alteration rings true as an idealized description of much constitutional history. It also indicates a broad agreement on constitutional morality at least at the time of adoption, which can undercut Waldron's deep disagreement and lack of objectivity claims.

b) Legal Archetypes

Curiously, one of the most interesting explanations of how agreement about constitutional morality can be sustained beyond the flashes of constitutional politics is provided by the main exponent of deep disagreement. Waldron has developed the concept of a legal archetype in an attempt to challenge the recent weakening of legal restrictions on torture by the federal government in the United States. Waldron defines a legal archetype as:

> the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of the whole structured area of doctrine, and does so vividly, effectively, and publicly, establishing the significance of that area for the entire legal enterprise.[251]

He argues that there are both foreground and background commitments to non-brutality in the operation of law embodied in numerous statutes across many historical periods in Anglo-American law. Waldron speaks of the movements towards the policy of torture moves as "a wholesale attempt to gut our commitment to a basic norm"[252] like the general provisions in American law for liberty, and lack of physical confinement[253]. Waldron mounts a wealth of textual evidence in support of his claim, which goes well beyond the famous restrictions of the Magna Carta and the eighth amendment to the U.S. Constitution.

Archetypes are to be seen as both a corrective to some of positivism's simplicities and as an elaboration on Dworkin's jurisprudence[254]. A legal archetype brings the spirit of an area of law into greater relief and:

> The spirit of a cluster of laws is not something given; it is something we create, albeit sometimes implicitly. It emerges from the way in which, over time, *we* treat the laws *we* have concocted. We begin to see that norms and precedents we have establish hang together in certain way. We begin to see that together the

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[251] Jeremy Waldron "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681-1750, 1723.
[252] Ibid., 1709.
[253] Ibid., 1724.
[254] Ibid., 1750.

> provisions embody a certain principle, our seeing them in that way becomes a shared and settled background feature of the legal landscape, and we begin to construct legal arguments that turn on their coherence and their embodiment of that principle.[255]

That principle is not just a tool for judges to extend precedent, but also becomes a publicly acknowledged emblem or icon available for critical use. Archetypes, like principles, initially depend on subjective determinations for their existence, but the emblematic status of archetypes that emerges over time through public recognition differentiates them from legal principles that may only be know to lawyers.

In a context of revolutionary action, one might wish to integrate legal archetypes into what Ackerman sees as the essential features of liberal revolutions to show that the legal archetype is an efficacious concept to explain legitimacy and continuity. According to Ackerman, liberal revolutionaries have limited transformative goals, compared to say Leninists anyways, and they aim to entrench the key elements of their political morality. By doing this and not pushing for a sudden and complete transformation of social life, they leave a stable legal framework which allows people to develop organically those entrenched principles so the public can engage in a type of continued, though constrained, revolution[256]. A revolution "is a successful effort to transform the governing principles and practices of a basic aspect of life through an act of collective and self-conscious mobilization."[257] Constitutional government can thus "*perpetuate* the most noble qualities of the revolution"[258] that might have been implicit to the past regime in archetypical form. For instance, one could easily view the American revolution as a extension of the liberal successes of Whig politics in Britain.

How we can explain the public recognition of an archetype in individual terms, however, requires further explanation.

c) Collective Intentionality

Recent developments in action theory are useful in explaining a constitutional morality in a way consistent with methodological individualism so we shall briefly explore them here. Intentionality is "the capacity of the mind to represent objects and states of affairs in the world other than itself."[259] Many different action theorists hold that individuals can work together to form something like a collective intention, which functions as the group view, and this collective intention is explicable in individual terms. Methodological individualism seem to force a bizarre combination of these practices[260]. Any "we intend" would amount to a possible infinite aggregate individual intentions in

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[255] Ibid., 1722.

[256] We need not accept fully Ackerman's dualistic model of law and politics with higher-order constitutional politics during elusive moments of public virtue and normal-politics ruled by partisan special interest and apathy.

[257] *The Future of Liberal Revolution*, pp. 5-6.

[258] Ibid., 266.

[259] John Searle, *The Construction of Social Reality* (1995) pp. 6-7.

[260] Ibid., p. 25.

each individual mind[261], "I intend that Ted, John ...n... go to the beach" "N intends that me, John, Ted...." Of course, it's unlikely that we hold all these implicit beliefs to explain a trip to the beach. Luckily there are more plausible and easier to handle models.

Margaret Gilbert argues that for collective intentionality "people must perceive themselves as members of a *plural subject*"[262] or in other words the mental representation of collective intentions employ "we" as the subject instead of "I". It is in this way that collectivities can even have beliefs and attitudes[263]. A collective belief is "a jointly accepted view," that is, it is the view that each of a set of persons has shown willingness to accept jointly with others."[264] Jointly accepted does not, however, mean that each individually accepted or individually believes the collective belief. Willingness is importantly weaker than accepting and may help explain the ignorance of constitutional norms noted above. For Gilbert, it is "both logically necessary and logically sufficient for the truth of the ascription of group belief that all or most members of the group have expressed willingness to let a certain view 'stand' as the view of the group."[265]

It not necessary that all or most or any members of the group continue to believe in the group view once it's been established. Gilbert illustrates this possibility with the example of a book club reading Philip Larkin's 'Churchgoing'[266]. It seems to Gilbert intuitively obvious that once the group view has emerged, on say the value of a poem, then members will feel themselves to have something like an obligation not to dissent from the group view without some explanation. Each member of the group might individually change their view and see bathos in the poetry where they formerly saw beauty, but unless the group view is revised with a jointly accepted set of collective intentions it will remain the group view.

The possibility of a group view standing without much or any individual support may explain the ignorance of constitutional norms. The collective intention account also has the benefit of being able to explain knowledge of public norms and a collective solidarity about them. Fellow citizens may, for instance, jointly accept that they are committed deeply to principles embodied in certain constitutional archetypes. However, the account can explain deep acceptance and quiet rejection, a point that must be underscored in our justificatory project. Collective intentions are dynamic and can flow to and from constitutional commitments without obvious objective legal effects. Polling will probably not expose these shifts, so judges relying on the account of a CCM outline above will be justly uncertain if they are actually using norms with a democratic pedigree.

4. The Common Law and Its Epistemic Limits

(i) The Nature of the Common Law

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[261] Ibid., p. 26.
[262] *On Social Facts* (New York: Routledge, 1989) p. 13.
[263] Ibid., p. 15.
[264] Ibid., p. 20.
[265] Ibid., p. 289.
[266] Ibid., pp. 288-294.

The common law refers both to a type of legal system and a particular jurisprudential doctrine about the nature of law and legal reasoning. In its classic form the doctrine gave an historical spin on medieval natural law theory where "the deeper reality manifested in the public statutes and judicial decisions was not a set of universal rational principles, but rather historically evidenced national custom."[267] The common law was thus a manifestation of shared values, the common good and reasonableness[268]. Judges were supposed to have a special ability to palpate the body politic's habits and customs through particular cases and formulate the underlying practices and principles into a coherent body of rules[269]. It was assumed that this underlying consensus existed and was not a product of judicial creativity; the role of the judge was to maintain continuity and ensure that cases were decided by the common public reason[270]. This early modern English doctrine is not what we shall mean when discussing common law, though there are overlaps with some of its claims.

Common law systems are those which have a great deal of judge-made law, where the development of law and legal doctrines take place mostly in the court room. By contrast civil law systems have strong legislatures who provide strict methods of interpretation for their judges and thus do not generally recognize judicial decisions as an original source of legal rules; they also use anonymous judicial opinions as opposed to the signed opinions of common law systems[271]. The best systematic account of the nature of the common law and judicial reasoning within it is provided by Melvin Eisenberg[272] and it is his account on which we will rely.

Common law is not exclusively textual. It is comprised of two broad types of propositions: doctrinal and social. Doctrinal propositions "purport to state legal rules and are found in or easily derived from textual sources that are generally taken to express legal doctrine"[273] e.g. statutes and precedents. Social propositions are all non-doctrinal propositions, such as "propositions of morality, policy and experience"[274] A common law court's function is to both resolve disputes and to enrich the supply of legal rules to resolve future disputes in ways consistent with doctrinal principles, i.e. creating binding precedents consistent with a community's institutions and practices.[275]

Common law adjudication is unique because the rules it employs often lack a canonical formulation and are often generated at the moment of application to a particular case. If a case falls under a controlling precedent then courts are bound by the principle of *stare decisis* (Latin for "to stand by things decided") unless there is a salient difference between the prior ruling and the particular facts of a case. Courts must then distinguish what about the particular makes it an exception to the rule. Judges can then rely on a range of social propositions to make a ruling for this types of case, though they are

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[267] Gerald Postema *Bentham and the Common Law Tradition* (Oxford: Clarendon, 1986) p. 4.
[268] Ibid., p. 9.
[269] Ibid., p. 37.
[270] Ibid., p. 19.
[271] Lon Fuller *The Anatomy of Law* (New York: New American Library, 1968), p. 134, 146.
[272] *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press, 1988).
[273] Ibid., p.1
[274] Ibid., p. 2.
[275] Ibid., pp. 4-5.

limited to using only those that are "supported by the general standards of the society or the special standards of the legal system. In this respect a court differs from a legislature, which can appropriately adopt legal rules that do not have such support."[276] The creation of new rules is also curtailed by needed replicability of judicial reasoning to ensure fairness of treatment and predictability of law for "if courts did not use a replicable process of reasoning the profession could not give reliable legal advice in planning and dispute-settlement, and planning and dispute-settlement on the basis of law would be frustrated."[277] Replicability is a coordination device comprehensible by professionals and possibly non-professionals who can consult their lawyers for greater certainty.

This quick idealized sketch of common law adjudication is complicated by the presence of constitutional law. Eisenberg argues that constitutional law is unlike pure common law due to textual importance of canonical texts. However, "establishing the full meaning of a canonical text may also involve application of the standard of systemic consistency, the standard of doctrinal stability, and a standard of congruence with relevant social propositions"[278] which are characteristic of common law reasoning. The relevant social propositions in constitutional adjudication would be further specified to include the moral norms embraced or subsumed by the text. The moral norms are closely related to social practices not what the court thinks best[279]. The moral standards judges employ must "be rooted in aspirations for the community as a whole, and that, on the basis of an appropriate methodology, can fairly be said to have substantial support in the community, can be derived from norms that have such support, or appear as if they would have such support."[280] Due to concerns about replicability of judicial reasoning, the sources of social morality must be limited to what all judges can be presumed to know. Official sources where moral norms have been articulated are thus a good source, but courts may also "attempt to determine what moral values justify existing social structure and institutions, and are therefore values to which citizens 'are already in some way committed'"[281] The court, however, "is not obliged to established empirically that a moral norm has requisite social support in fact, which it cannot do, but to use appropriate methodology to make a judgment on that issue"[282] By rendering a judgment the court opens up discussion to wider audience who must respond if the court is wrong.

(ii) Epistemic Limitations of the Common Law

The previous section tried to illuminate some of the common law's virtues like the case-by-case development of social morality, but this section will focus on its vices relative to our justificatory project. As a non-ideal theory, theories of adjudication are constrained by existing practices of legal reasoning and evidence rules. Relying on Alvin Goldman's recent critique of common law systems as providing unreliably true

[276] Ibid., p. 9.
[277] Ibid., p. 11.
[278] Ibid., p. 196.
[279] Ibid., p. 16.
[280] Ibid., p. 15.
[281] Loc. Cit.
[282] Ibid., p. 18.

judgments, I challenge the claim that judges can ascertain the contents of a constitutional morality. It might be possible for judges to know their CCM, but that would require large revisions to adjudicative practices in common law systems. Large scale-revision is not advocated because of the concerns about the primacy of description in the theories of adjudication. Any change in policy needs to confront other possible options, and since I have not done so I cannot recommend such changes in good faith. Also, as I argue in the next chapter the claim that, if known, a CCM would provide adequate guidance is unlikely given its contingent and potentially conflicting contents that require a weighting of principles that must be subjective.

Our attempted indirect justification of the authority of constitutional courts, like all good indirect justifications of authority depends on the knowledge being available to the authority who is also a reliable good faith actor[283]. But do common law judges have the knowledge of a CCM readily available? Even if it is available, there are constraints of replicability outlined in the last section. The method of discovery of a CCM cannot be too elaborate otherwise cases would not be decided on the same grounds which raises problems both of fairness and democratic legitimacy.

In a recent book, Goldman focuses on epistemology of social situations and tries to discover reliable mechanisms for generating knowledge as true beliefs while avoiding error[284]. He calls this search veritistic social epistemology, which in the law aims to produce accurate legal judgments[285]. Goldman makes a comparative evaluation between current common law and civil law procedures on these lines. Specifically, he seeks to discover how these systems manage evidence and information to produce accurate judgments in cases. Judges in both systems must identify material (or non-legal) facts, decide how they are to be classified according to legal standards and from this judgments are rendered in particular cases[286]. Goldman's emphasis is on the systems' powers to find material facts[287]. He admits that "No system can be perfect, in part because parties to law suits are commonly prone to deception, and deception is hard to detect. Nonetheless, accuracy is to be sought, as far as is feasible, and subject to other constraints."[288] These other constraints include efficiency, cost, and the non-violation of legal rights[289].

The key difference between common law systems is the identity of the fact-finding power. The systems also differ in the trier of fact; common law systems often have lay juries, while civil systems use a professional judge or a board of judges (though now in some criminal case lay judges are included)[290]. This difference is not properly relevant to our concerns as we're concerned with constitutional law at the appellate level. There the salient differences appear in other fact-finding powers which differ between the adversarial and inquisitional systems. Common law systems use a reactive fact-finding model where the two parties of the dispute present the evidence to the court. For instance,

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[283] Leslie Green *The Authority of the State* (Oxford: Clarendon, 1988) p. 56
[284] Alvin Goldman *Knowledge in a Social World* (New York: Clarendon, 1999) p. 5.
[285] Ibid., p. 272.
[286] Ibid., p. 273.
[287] Ibid., p. 274.
[288] Ibid., p. 279.
[289] Ibid., p. 284.
[290] Ibid., p. 290.

partisan lawyers brings forward witnesses, whereas in civil law this is done by judges selecting expert witnesses.[291] In the adversarial system, witness coaching and expert selection by partisans does not allow for the full market place of ideas rationale underlying the system to work[292]. Opposing 'experts' can be put forward to muddy the waters. We might think here of the tobacco company doctors or scientists from the creationist Discovery Institute who offered testimony on the scientific merits of intelligent design in a suit against a Pennsylvania school board[293]. Civil law systems mitigate problems of biased experts by having a separate lists of experts in relevant areas that judges draw by lot.

Continental systems further differ in that the judge is both trier of fact and investigator into material facts. Again, common law judges are much more passive. Lawyers assemble facts in their statements of fact and judges pretty much act as referees who rely on a complex heap of evidence rules to exclude elements of those statements before seeing which law is relevant to the remaining facts[294]. Evidence rules are especially complex when it comes to eliminating certain forms of testimony like hearsay[295]. Despite these exclusions, the evidential base can still be quite large. Allen and Leiter note that at least in theory, " the adversarial system should produce a very large evidential base, one that might even match or exceed in scope the evidential base that the scientist or historian might consider for his distinctive purposes."[296] Whether the evidential base is relevant or any good, however, is not necessitated. Even an originalist like Scalia complains that U.S. courts are often inundated with reams of useless legislative history presented as evidence equal with precedents and statutes[297]. Sometimes the evidential base offered will be of useful socio-scientific data on the likely effects of certain decisions and policies[298].

Evidence offered by partisan advocates and defenders should probably be looked at suspiciously. There is after all a large incentive to hide negative evidence[299]. Rules of evidence that obligate disclosure might not guarantee compliance. In the case of Washington State Physicians Insurance Exchange and Association v. Fisons Corporation (1993), there was a particularly grim illustration of this practice[300]. It was alleged that Fisons' asthma medication gave brain damage to a child then suffering from another viral

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[291] Ibid., p. 291.
[292] Ibid., p. 297 and 309.
[293] Tammy Kitzmiller, et al. v. Dover Area School District, et al. 400 F. Supp. 2d 707 (M.D. Pa. 2005).
[294] *Knowledge in a Social World*, p. 293.
[295] For a critical discussion of these rules in the U.S. system see Mirjan Damaska *Evidence Law Adrift* (New Haven: Yale University Press, 1997).
[296] Ronald Allen and Brian Leiter. "Naturalized Epistemology and the Law of Evidence," *Virginia Law Review* 87 (2001): 1491-1550, 1500.
[297] Antonin Scalia "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in Antonin Scalia et al. *A Matter of Interpretation* Ed. Amy Gutmann (Princeton: Princeton University Press, 1997) pp. 29-37.
[298] The practice was inaugurated in the U.S. with the famous "Brandeis brief", which Louis Brandeis presented wrote for the labour law case Muller v. Oregon 208 U.S. 41 (1908).
[299] *Knowledge in a Social World*,, p. 302.
[300] Cited in William Talbott and Alvin Goldman "Games Lawyers Play: Legal Discovery and Social Epistemology," *Legal Theory* 4 (1998): 93-163.

infection. The corporation denied they were at fault. Shortly before the trial closed, a whistle blower came forward with a memo Fisons had sent to some physicians warning of life threatening risk of toxicity their asthma medication posed when administered during viral infections. The drug was still marketed though most doctors did not know its risks. There are likely many other cases similar to this one, or analogous cases where actuarial calculations dictated that not recalling a product and settling with plaintiffs who had to sign confidentiality agreements as a condition of their settlement would be more cost-effective. Since the common law depends on parties to disclose relevant information it is likely they are often subject to this sort of shenanigans. They will lack facts relevant to a case and in Eisenberg's terms, be left with an inadequate sample of social propositions, especially in constitutional cases where evidence of practiced morality is important to creating consistent doctrine.

If CCM adjudication has to rely on social practices as a source for knowledge about constitutional morality then it is subject to limited fact finding powers of reactive common law judges. Although much of his case is based on the unreliableness of jury judgments, Goldman concludes that in key areas "the common-law system seems to be veritistically inferior to the Continental one"[301] One can retort that the incentive to inquire energetically and deeply for civil law judges is low compared to lawyers in the common law system, but this claim must be balanced with the amplified dangers of inadequate or misleading information these energetic attorneys can provide.

There are additional problems for the common law approach even if lawyers are scrupulously honest. Supreme courts simply do not decide very many cases compared to the number of petitions they receive. The U.S. Supreme Court's workload has declined steadily from 1959 to now[302]. The gradual development of doctrine on a case by case basis would lead to inadequate guidance. Lower courts would lack guiding precedent on many matters and have to make their own judgments about inadequately sampled social propositions and doctrinal consistency. Relevant parties may lack the funds to appeal, and if they did the Supreme Court takes few cases. Posner notes that because of these facts "the Court tries to use the few cases that it agrees to hear as occasions for laying down rules or standards that will control a large number of future cases."[303] The expansive controlling precedent will limit the way future appellate courts can decide future relevant cases and it may control in a way not necessarily with the constitutional morality that judges might only receive glimpses of through adversarial presentations. The snapshots of the CCM presented in various courtrooms may amount to an elephant, but individual judges who do not know all the doctrine of a complex modern system may only misdescribe elements of the whole like the blind men of the parable.

5. Conclusion

The conclusions of this chapter are mixed. I had hoped to show that there is a

[301] *Knowledge in a Social World*, p. 313.
[302] For the relevant statistics see Posner *How Judges Think* (Cambridge, Mass.: Harvard University Press, 2008) p. 270.
[303] Loc. Cit.

strong response to Waldron's meta-ethical skepticism that did not have to rely on moral realism. In my account of the nature of constitutional moralities as intersubjectively produced systems of norms that have been legally incorporated I think I have provided such a response. However, empirical considerations of common law methodology and judicial practice make the reliable and adequate discovery of constitutional moralities appear to be somewhat unlikely. But if these problems of access are overcome then we have refuted Waldron's claims about a lack of agreement and a lack of judicial expertise in rights. That leaves the critic of judicial review with the argument that judges necessarily import their subjective views into their decision-making. The next chapter will test the soundness of that remaining claim by analyzing the ability of a CCM to provide sufficient judicial guidance.

Chapter 3:
Why Constitutional Law is Inescapably Aleatory:
Applying a Constitutional Morality in a Common Law System

Introduction

Whether law is indeterminate, and if so, whether this indeterminacy is necessary and widespread are descriptive questions, but their answers have decidedly normative implications. When law is indeterminate there's more than one justifiable legal answer in a dispute. Judges have a professional duty to decide cases, thus they need a means to resolve indeterminate cases. If such cases are frequent there needs to be a general institutional solution. For instance, judges can have the power to refuse jurisdiction, refer cases back to the legislature for resolution, or can decide cases according to their non-legal merits. If law is indeterminate even for a small set of cases then one of law's most basic and uncontroversial functions of guiding conduct may be affected in that range[304]. The weak modality 'may' is appropriate because particular institutional solutions to legal indeterminacy, like the three just listed, can yield predictable results and thus it is possible to plan reliably for these types of cases[305]. As a review of the legal indeterminacy debate shows, there are strong reasons to think that every legal system contains some indeterminacy, and requires a general means to cope with it. We must see how Waluchow's theory of judicial review can deal with these situations, what their implications are for the guidance of judicial decisions and ultimately for the democratic justification of judicial review.

The central contention of this chapter is that CCMs are sources of legal indeterminacy and that if cases are decided by them then judges must make discretionary subjective judgments, thus the democratic justification of judicial review falls short at the level of outcome. One should step back here and recall that if we've learned nothing else from Socrates, it's that common moral views are rife with implications in tension, if not outright contradiction. Often 'what we all share' is "an overlapping jumble of only half-developed and potentially contradictory views"[306]. If these common moral resources contingently incorporated into the law and then assembled into a system are what judges must rely upon to decide cases then it's highly likely that multiple, and possibly conflicting, outcomes, can be justified. Despite citizens' high-minded constitutional politics, there a good reasons to be wary of the notion that prior to judicial recognition a CCM is a determinate, coherent and ordered doctrine. If multiple outcomes are possible and only one decision can be law then judges must decide on grounds other than the community's true moral commitments.

We've seen that Waluchow allows the judicial discovery of the true moral commitments of his community to be counterfactual (i.e. these *would* be our

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[304] For a provocative discussion of the guidance function, see Scott Shapiro "Law, Morality, and the Guidance of Conduct," *Legal Theory* 6 (2000): 123-170.

[305] Determinacy does not entail predictability and indeterminacy does not entail unpredictability, see Matthew Kramer *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007) p. 18.

[306] Raymond Geuss, *History and Illusion in Politics* (Cambridge: Cambridge University Press, 2001) p.5.

commitments if we had enough time to consider our values thoroughly and achieve reflective equilibrium)[307]. 'Would', however, implies 'could,' and 'could' implies alternatives[308]. Given the collective action problems involved in amendments, judges might not have all the community's true commitments at their disposal during deliberations and the true commitments of the community may not match the judicial representation[309]. Even if judges did have all the possible sources available, the smoothing out necessary for equilibrium requires judges to step outside even the enriched class of legal reasons provided by common law constitutionalism; something has got to give in the weighing of values contingently amassed in a CCM and there is no instruction manual dictating what. It's likely that this balancing is not solved by caprice, but by the ideology of a judge. The living tree theory of adjudication's commitment to a knowable set of moral norms and judicial expertise in accessing and applying them can be held to a point, but the avoidance of subjectivity claim must fall away.

This necessity of subjective judgment due to indeterminacy is illustrated by the infamous Dred Scott[310] case sanctioning slavery and stripping blacks of citizen rights in the antebellum U.S.[311]. It is arguable that both the property status of blacks in some states and limited citizenship status in others combined with complex federal authority structure allowed for multiple and conflicting outcomes. From this example, we see that judicial decisions can often only be as good as a society's norms allow and that sometimes society's conflicts do not allow for non-partisan judicial decisions; such radical problems have their source in social practices and must be resolved outside the courtroom. However, since some liberals argue that foreign law can provide remedy in constitutional rights cases where domestic law appears iniquitous, later I will examine Waldron's recent defence of citing foreign law in such cases and argue that it fails on democratic grounds.

Our inquiry shows that we are left with some judge-made law given the courts' fact-finding powers and the nature of norms they employ in common law constitutional systems. The premier democratic justifications of judicial review are insufficient at the level of outcome, and one can infer that no sufficient one will be forthcoming. In closing, I examine supplementary justifications of judicial review that relies on the theory of interpretation offered in this thesis, and consider some of their political and institutional implications.

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[307] *A Common Law Theory of Judicial Review*, p.194.

[308] With talk of reflective equilibrium "there is often an unacknowledged shift between '*could be affirmed by anyone*' and '*would be affirmed by everyone*'." Raymond Geuss "Equality and Equilibrium in the Ethics of Ernst Tugendhat," in *Morality, Culture and History* (Cambridge: Cambridge University Press, 1999), p. 59. Under what circumstance is of course relevant, but for Geuss spelling out the circumstances seems somewhere between tricky and impossible. See also his critique of Habermas on this point in *The Idea of a Critical Theory* (New York: Cambridge University Press, 1980), p. 55.

[309] Geuss (1980) notes a similar problem for the critical theorist drawing out the epistemic norms of the agents she hopes to address. In formulating people's norms, she "may impose on them a determinateness they did not before possess, and may cause the agents to change other parts." Ibid., p. 94.

[310] *Dred Scott* v. Sandford, [1] 60 U.S. (19 How.) 393 (1857).

[311] Some might question if the case is a genuine instance of indeterminacy, but I am using a historical example simply to illustrate a conceptual point. If history points against my assessment, then one can use one's own imagination to concoct cases with conflicting outcomes rooted in an indeterminate set of norms.

2. The Case for (Some) Legal Indeterminacy

(i) Indeterminacy Defined

To say that law is indeterminate means that for at least one case there is no correct legal answer to that dispute[312]. It is important to note at the outset that determinacy is a logical or ontological property and not an epistemic one[313]. If law is determinate for a particular dispute then there is one correct legal answer to it and this is a fact about that legal system[314]. Determinacy in law is thus similar to determinacy in physics, where determinism is the thesis that there is only one possible future at *any* given moment. In a classic account of determinism, Laplace states:

> An intellect which at any given moment knew all the forces that animate Nature and the mutual positions of the beings that comprise it, if this intellect were vast enough to submit its data to analysis, could condense into a single formula the movement of the greatest bodies of the universe and that of the lightest atoms for such an intellect nothing could be uncertain; and the futures just like the past would be present before its eyes[315].

In law, the hypothetical type of intellect who knows all laws, precedents, principles, underlying political morality, and their results when mixed with factual disputes is usually referred to as Herculean. Dworkin famously holds that from Hercules' vantage point "there is one right answer in [any] hard case"[316], though as we saw in chapter one it's hard to see how Dworkin's account of morality would not make this indemonstrable.

The physics analogy is imperfect for most claims about law's determinacy are dissimilar to those about sub-atomic causal determinacy. Few hold the position that *all* law is indeterminate because indeterminacy is a property that admits of degrees[317]. When law is said to be indeterminate it is usually a more modest claim about law in a particular instance, or type of instance, in particular system or type of system. To say that law as a system is indeterminate, a more extravagant thesis, means there is no single correct legal

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[312] The emphasis on a correct *legal* answer cannot be forgotten. Andrei Marmor makes this point clearly, "indeterminacy is always from a particular point of view: an answer to a particular question can be objectively indeterminate from a legal point of view, for example, but it may have a determinate moral answer, and vice versa" *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001) p.142. For more on this point see Waluchow *Inclusive Legal Positivism* (1994), pp.268-9.

[313] Waluchow *Inclusive Legal Positivism* (Oxford: Clarendon, 1994), p. 237.

[314] Kent Greenawalt runs together epistemic and logical/ontological categories when he treats a correct answer as one "on which virtually all lawyers and others familiar with the law would agree, and against which there was no powerful normative argument consonant with the legal system." *Law and Objectivity* (New York: Oxford University Press, 1992), p. 207. Kramer rightly notes that "determinate correctness does not entail demonstrable correctness" p. 17 (n. _ above). For example, there is a fact whether or not it rained in the location the reader is reading this passage 16043 years ago, but it may not be ascertainable by the most sophisticated climatologists and meteorologists. One must avoid the common error of inferring indeterminacy from unascertainability, Ibid., p. 19.

[315] Laplace (1814), quoted in Daniel Dennett *Freedom Evolves* (New York: Penguin, 2003), p. 28.

[316] *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) p. 290.

[317] *Objectivity and the Rule of Law*, p. 15. My usage of 'law' from herein refers to legal not scientific laws.

answer to any dispute in that system to the point the system's status as a system is undermined. I will refer to limited indeterminacy within a system as local, and system-wide indeterminacy as global.

In adjudicative contexts, law's indeterminacy, whether local or global, is a problem because if there is no correct legal answer to a case then judges can use discretion and reach a conclusion that may be morally suspect or depending on the political context, democratically illegitimate law-making[318]. The problem can go deeper, for as Jules Coleman and Brian Leiter note: "Indeterminacy is a problem when it suggests that the exercise of rational judgment cannot be defended against a different exercise of judgment"[319]. If the global thesis is true these problems are rampant and our justificatory project is doomed, thus I will defeat the global thesis before identifying the sources of local indeterminacy and their plausibility.

To a casual observer of appellate courts, indeterminacy may seem widespread, but as a statistical matter this is not true of common law systems. Only cases of sufficient controversy, contestability or those backed by adequate funds reach the appellate level. Even the most litigious of citizens does not want to pay for lawyers and courts fees unless there's a chance of winning her case. By contrast, many indigent criminal offenders will continually appeal if there are publicly-allocated funds available to do so. There is thus a large class of cases, appealed and not, where solutions are clear and are not subject to high-profile split decisions[320]. Additionally, in developed legal systems there are usually closure rules alleviating any legal vacuums so indeterminacy by absence is avoided[321].

The debate about legal indeterminacy has come to somewhat of a stable consensus that law is locally indeterminate with the degree to which depending on the system[322]. Few defend the more radical thesis since many jurisprudents have successfully argued that the broad attacks of the Critical Legal Studies movement (CLS) against liberal legal systems as globally indeterminate have failed and no one else has put forward the claim. CLS is largely an American movement whose loosely affiliated group of left-wing academics argue that the liberal rule of law is illusory, law is largely, if not wholly, indeterminate, and thus it is really politics through a camera obscura. Space does

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[318] Joseph Raz writes that it "is regrettable that so much of the debate about the existence or nonexistence of judicial discretion appears to take it for granted that the fate of the view that courts have discretion depends on the indeterminacy thesis." See his "Legal Principles and the Limits of Law," in *Ronald Dworkin and Contemporary Jurisprudence* Ed. Marshall Cohen (Totowa, NJ: Rowan and Allanheld, 1984), 73-87, p. 83.

[319] See "Determinacy, Objectivity and Authority," in *Law and Interpretation* Ed. Andrei Marmor (New York: Oxford University Press, 1995), p. 227.

[320] H.L.A. Hart *The Concept of Law* 1st ed. (Oxford: Clarendon, 1961), pp. 141-2.

[321] As Marmor observes, legal systems often deal with such the possibility of gaps - for instance where a comparatively novel case is subsumable by two different laws or none seem to apply - by default rules like rules that determine burdens of proof, presumptions and canons of construction which mitigate the seeming undecidability (by legal standards) of indeterminate cases, n. 8 above, p.143. See also Kramer on closure rules , p. 33, 46.

[322] Hart nice captures the view when he writes that, in "every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statures, or in developing and qualifying rules only broadly communicated by authoritative precedents." *The Concept of Law*, p. 132.

not permit an exploration of the numerous interesting, if often flawed[323], arguments of the movement here, but a brief look at some of its popular and influential critical accounts of legal indeterminacy will be helpful to situate the debate. It should be noted that many critical theorists have retreated from the more provocative arguments for systematic indeterminacy.

(ii) Global Indeterminacy

In his later move towards an eccentric liberal political position, prominent critical theorist Roberto Mangabeira Unger disparages the strong indeterminacy thesis as a spurious radicalisation of a more local indeterminacy[324]. But despite Unger's later concerns, an earlier canonical account of his became a touchstone for many arguments that law, at least in Western states, is indeterminate. Unger had argued that in the U.S. both public and private law contain confused and underdeveloped conceptions of democracy and the market and these notions remain but the indeterminate contents of abstract categories until judicial application[325]. Under American law, judges are the ultimate arbiters of what the law is unless constitutional amendment is made, which overrides the usual political hierarchy. Judges thus wield tremendous power to fix concretely the law made by legislators. Formalist approaches to adjudication where judges simply 'apply the law' hide both the ever-present creative power of the judiciary and the variety of competing abstract conceptions in the laws of capitalist liberal democratic legal systems. Therefore, formalist approaches deny the wide range of potential social choice available by imposing an oppressive variant of what are contested normative concepts by wearing a false mask of judicial duty[326]. As a practical matter, officials in such legal systems should not build off inherited and inherently arbitrary models, but use their creative powers within the system for destabilizing, but emancipatory goals[327]. Judges become part of the political vanguard. Now certainly there are vague predicates in the law, but not every term is vague and it's not obvious how judicial creativity is to bring about radical change. Other branches of government would certainly try to nix romantic socialist readings of their enactments.

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[323] Two important early critiques can be found in Ken Kress "Legal Indeterminacy," *California Law Review* 77 (1989): 283 and Lawrenece Solum "On the Indeterminacy Crisis: Critiquing Critical Dogma," *University of Chicago Law Review* 54 (1987): 462-503.

[324] See Unger, *What Should Legal Analysis Become?* (New York: Verso, 1996) p. 120. Unger is not the only important player to back off the global thesis due to its conceptual and descriptive problems. For instance, in his *Critique of Adjudication* (Cambridge, Mass.: Harvard University Press, 1999), Duncan Kennedy denies the global indeterminacy thesis because he rejects the view that "legal materials and legal reasoning are sufficiently plastic that they can offer an acceptable post hoc rationalization of whatever result the judge favors, and judges are habitual rationalizers" as not "even slightly plausible," p. 159, 259. Further, it is a widely noted fact that judges "often declare and apply rules that they would never vote for if they were legislators" p. 1. Given these restraints Kennedy attempts to analyze the ideological role in judicial lawmaking, which he argues is distinct from the role of ideology in legislative lawmaking.

[325] *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986) pp. 7-8.

[326] Ibid., p. 8

[327] Ibid., p. 91.

As Andrew Altman notes in his sympathetic but critical account of CLS[328], Unger's thesis is not the only argument for global indeterminacy, though one might see it as the most persuasive, if it even qualifies as truly global. Coleman and Leiter correctly note that CLS is more concerned with taking on liberalism as a whole, often by reducing it to a naïve epistemological foundationalism than in adequately characterizing its legal systems[329]. They rightly challenge the commitments of liberalism as portrayed by CLS, but more importantly for us they show why many other arguments for systemic indeterminacy are shoddy[330]. Some critical theorists are radical sceptics about meaning and rely on glosses of Derrida, Kuhn or Kripke's reading of Wittgenstein to support their position[331]. Words are only 'empty vessels' in which any meaning can be put[332]. If there is, as Altman puts it, such "unconstrained creation of meaning" then judges can put any ideology into the law. But if that is the case then radical indeterminacy is self-refuting[333], for if all words are indeterminate then so are the words of the radical indeterminacy argument so nothing is established without determinate meaning.

To be more charitable to the position one can try to argue for the possibility of a radically discretionary legal system, but even an ideal-type discretionary system would contain at least one determinate rule and therefore not be globally indeterminate[334]. Raz illustrates the need for at least one determinate rule nicely. One can imagine a Solomon-like system where every case is decided by discretion. In such a legal system, there is still one norm or instruction guiding the adjudicator "they are always to make that decision which they think to rest on the basis of all the valid reasons"[335]. The official is guided to act on reasons, even if the choice of relevant reasons and the criterion of rationality are discretionary matters. Radical discretionary systems must contain at least one norm, however underdetermined in content, in order to be systems. The only debate to be had about legal indeterminacy is thus its scope within a system.

(iii) Local Indeterminacy

As I claimed in the first chapter, all legal indeterminacy springs from one or more of the following sources: vague language, conflicting statutes, precedents or principles, and competing interpretive rules.[336] There are sound versions of all of these arguments

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328 See *Critical Legal Studies: A Liberal Critique* (Princeton, Princeton University Press, 1990).

329 "Determinacy," p. 205.

330 Endicott argues that all arguments that rest on global linguistic indeterminacy are necessarily self-refuting, *Vagueness in Law* (Oxford: Oxford University Press, 2000) p. 5.

331 Occasionally, mention is made by critical theorists that law is 'contradictory', but as Coleman and Leiter note if that term is used correctly then the indeterminacy debate is misguided because "legal standards are rarely formally contradictory. If they were, the problem with legal authority would be that outcomes would be indeterminate; rather, it would be that the law would be formally contradictory", p. 223.

332 For examples see Clare Dalton "An Essay in the Deconstruction of Contract Doctrine," *The Yale Law Journal* 94 (1985): 997-1114, and Gary Peller "The Metaphysics of American Law," *California Law Review* 73 (1985):1151-1290, 1167. For a refutation see Altman, pp. 90-98.

333 Ibid., p. 91, 93.

334 On the incoherence of extreme rule skepticism see Hart, p. 133.

335 *Practical Reason and Norms* 2nd. ed. (Princeton: Princeton University Press, 1990) p. 138.

336 The last category is quite broad. It includes not only canons of construction, but also interpretive

and they all give rise to problems discretionary authority. However, demonstrating their conceptual necessity, and the scope of indeterminacy in actually existing legal systems are very different matters. While all the sources are of intrinsic interest, I don't want to focus on all the varieties here, but rather show why the model of law underlying Waluchow's theory of adjudication makes likely at least one of them, and then focus on the type that most clearly poses the problem for our justificatory project - the conflicts of principles in a CCM.

Legal indeterminacy is fundamentally about the relationship between the set of legal reasons and legal outcomes[337]. The legal indeterminacy thesis means either that legal reasons may fail to *justify* a single determinate legal outcome in a particular case or that legal reasons are inadequate as *causes* of judicial opinions[338]. The latter claim is trivial if causes is treated broadly since the production of so complex an artifact as a legal opinion is obviously not causally exhausted by legal reasons. Most arguments for legal indeterminacy focus on how legal reasons do not justify a unique legal outcome like the premises of a sound syllogism justify its conclusion, we can thus focus on the justificatory aspect at the core of the debate. It can, however, be said that one would want legal reasons to cause a decision, and not merely be dressing thrown on after it's made.

In "Legal Indeterminacy,"[339] Leiter follows his earlier work with Coleman by noting that to say law is indeterminate is to say that the class of legal reasons is indeterminate. The class of reasons contains four elements:

> 1. Legitimate *sources* of law (e.g. statutes, constitutions, court decisions, social policy, morality);
> 2. Legitimate *interpretive* operations that can be performed on the *sources* in order to generate rules of law (e.g. proper methods of interpreting statutes or prior cases or of reasoning about moral concepts as these figure in the sources);
> 3. Legitimate *interpretive* operations that can be performed on the *facts of record* in order to generate facts of legal significance (e.g. proper ways of grouping and categorizing fact situations for purposes of legal analysis); and
> 4. Legitimate *rational* operations that can be performed on facts and rules of law to finally yield particular decisions (e.g. deductive reasoning)[340].

Arguments about indeterminacy must rest upon a theory of law, for instance one that can

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methods that might fail to find the determinate grounds it aims to find, i.e. unclear legislative intent or purpose. For an nice survey of where indeterminacy comes from see Timothy Endicott, Chapter 3 "Sources of Indeterminacy", n.26 above, pp. 31-55. Marmor adds to this list the condition of factual indeterminacy about the legal case where "the applicability of legal standard may depend on whether certain facts are the case and this state of affairs is not ascertainable in at least some cases." But Marmor does not further develop this point to show that this is situation is not caused by the epistemic limitations of legal officials but rather vexing features of reality.

[337] "Determinacy," p. 212.

[338] Loc. Cit.

[339] *Legal Theory* 1 (1995): 481-492. A revised version of the article that omits the criticisms of CLS arguments for indeterminacy is included in his *Naturalizing Jurisprudence* (New York: Oxford University Press, 2007) pp. 9-12.

[340] Ibid., 481.

explain the above class that specifies law and the legitimate ways of interpreting it. Leiter argues that only legal positivism has an adequate account of legal sources[341].

Such a claim requires cashing out a general jurisprudential debt that space constraints do not fully allow. The arguments of legal indeterminacy assume that legal positivism is true. The positivist account of the nature of legal sources and thus the class of legal reasons, allows for, and suggests a regularity of, indeterminate cases. Natural law theorists who hold that law is necessarily connected to a realist morality may deny such a claim, but thankfully the prominent natural lawyer John Finnis allows for moral reasons to "run out" and Michael Moore's account of moral realism and legal authority are implausible[342]. Further, the positivist thesis that law is an artifact of human production is much less controversial than stories about law's necessary relation to moral reality or to some sophisticated, but suspiciously substantive account, of practical reason[343]. The case can be further buttressed, but to do so here will distract us from our main task. It is enough to note that legal positivists hold that law is a social construction whose existence and recognition depend on social facts, and that it is not identical or necessarily connected to morality, which on certain conceptions could provide a fully determinate system.

A legal system is comprised of customs and rules where officials minimally have a rule to separate legal from non-legal norms, powers to change the law, and settle disputes. Laws are generated by humans with law-making powers within the system. Raz claims that "if the content of the law is exclusively determined by social facts, then law is gappy."[344] Gaps are legal statements which are neither true nor false[345]. Some qualification is required on this point. Truth is a property of propositions, but not all meaningful sentences are exhausted by the set of declarative sentences with truth values. Commands, admonitions and the ejaculations are all meaningful though there is no sense in asking how "Don't go breaking my heart!" could be true or false. Many laws can, and do, take the form of commands, but it's still sensible to say it's true or false that a sentence belongs to a legal system[346]. When we speak of legal gaps as lacking truth value we mean it is indeterminate whether that proposition is validly part of the system or not.

There is still a gap in the argument that because all law comes from social sources it must contain indeterminacy. Coleman and Leiter attempt to show the missing link:

> Law is necessarily indeterminate simply because no matter how rich the set of authoritative standards and operations are, there will always be cases that fall under no binding standard; there will always be gaps. To be sure, the extent of the

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[341] Ibid., 492.

[342] On how moral reality runs into indeterminacy see his *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), pp. 284-6. On the problems of Moore's realism see Brian Bix "Can Theories of Meaning and Reference Solve the Problem of Legal Indeterminacy?" *Ratio Juris* 16 (2003): 281-295.

[343] See the recent interesting work of Mark C. Murphy: *Natural Law and Practical Reason* (Cambridge: Cambridge University Press, 2001); *An Essay on Divine Authority* (Cornell: Cornell University Press, 2002); and *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006).

[344] "Legal Principles and the Limits of Law", p. 81.

[345] Loc. Cit.

[346] Neil MacCormick *Legal Reasoning and Legal Theory* (Oxford: Clarendon, 1978), p. 271.

> problem of indeterminacy that results from gaps will be diminished by ever enriching the set of authoritative standards and sources; still, it cannot be eliminated altogether. There will always be gaps in the law.[347]

At best this claim is probabilistic. It requires supplement to claim necessity, but a brief consideration of how law works goes a long way, though not entirely. Laws are written in general terms by humans with imperfect knowledge. Hart notes that all law-making is marked by a relative ignorance of fact and a relative indeterminacy of aim[348]. The ignorance of fact is rooted in the human inability to see the future and plan for all possible cases and exceptions to a rule[349]. The indeterminacy of aim refers to the some degree incomplete intentions that mark human goals. Waluchow takes these two features to be central to the 'circumstances of rule-making'[350] that characterize all attempts to govern life by rules. Even the construction of a simple library code will encounter unforeseen problems in meting out fines due to problems of after-hour drop off, holidays, and recalls that make an adequate formal modelling difficult except at a simplified level[351].

It is not only cases that lawmakers did not expect which can lead to indeterminacy. Complex systems contain many rules and it's unlikely that any officials know them all, let alone all their interrelations and implications. The lack of internal omniscience by law-making officials makes the enactment of overlapping and conflicting rules likely. Pressing matters of life can force legislative action and then a lawmaker's concern for consistency with prior law is not always a priority. Sooner or later those affected by the rules in tension will require clarity or resolution if they've run afoul of one, and officials may lack a rule-like means to decide what law to which to give force.

The great constitutional thinker Alexander Hamilton recognized that discretion is a general feature of law, especially in the situations just outlined. He writes:

> It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other.[352]

How to decide which is given force and which is excluded? Hamilton holds that the more

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[347] "Determinacy," p. 218

[348] *The Concept of Law*, p. 125.

[349] Ibid., p. 127.

[350] *Common Law Theory,* pp. 258-270.

[351] For some interesting considerations on the ability of formal models to capture simplified rule systems see Andrew Jones and Marek Sergo "Deontic Logic in the Representation of Law: Towards a Methodology," *Artificial Intelligence and Law* 1 (1992): 45-64.

[352] Federalist No.. 78, Alexander Hamilton, James Madison and John Jay *The Federalist Papers* Ed. Robert Scigliano (New York, Modern Library, 2001), p.499.

recently enacted law is to be given priority. He thinks that this rule of construction is:

> not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between interfering acts of an *equal* authority, that which was the last indication of its will should have the preference.[353]

Unlike Hamilton, we cannot assume the truth and propriety of this canon of construction. The canons of construction are certainly important rules of the judicial profession, but Hamilton is right to note that they are not usually, if ever, enacted rules of positive law (that's certainly true in common law, though not necessarily in civil law, systems)[354]. The rules of construction of uncertain pedigree smooth out conflicts and both the statutory and constitutional level. There is also the further problem of possibly conflicting amendments to the constitution. Perhaps citizens enact an amendment not realizing that it conflicts in part with other rights listed in the document. How are we to know that the more recent should be given force when that earlier has at best been implicitly repealed? Hamilton's view is not always practiced. As Greenawalt notes "In India... provisions of the Constitution have been declared invalid because they conflict with the principles of more important parts of the Constitution."[355] This adds another tier to the amendment hierarchy if the constitution can itself be overturned internally. Conflicting laws can occur at the statutory and constitutional level and different canons of construction can privilege different sides of the conflict. This sort of indeterminacy is very difficult to eliminate or to justify eliminating on neutral grounds.

It worth noting briefly in closing why some systems might desire to have judges make discretionary judgements in indeterminate cases. First, it is immensely difficult to design a gapless code. It is possible if one constructs a wide enough closure rule, like 'all indeterminate, or unregulated, cases are to be decided in favour of the defendant.' But this might not be consistent with some of the moral directives within the law itself, which can create further headaches[356]. Hart writes that:

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[353] Ibid.

[354] Once again it worth citing another famous practitioner. Current American Supreme Court Justice Stephen Breyer argues that "it *is* impossible to ask an ordinary citizen (or an ordinary legislator) to understand the operation of linguistic canons of interpretation" *Active Liberty* (New York: Knopff, 2006), p. 100. That the interpretive operations of a court do not have a clearly democratic pedigree requires more attention than it has received in the literature, but unfortunately we do not have the space to pursue it here.

[355] Kent Greenawalt "Constitutional Interpretation," in *Oxford Handbook to Jurisprudence* Ed. Jules Coleman and Scott Shapiro (New York: Oxford University Press, 2002), p. 290. For the cases see Gopalan, A.K. v. State of Mad., AIR 1950 SC 27, 93; Moinuddin v. Uttar Pradesh, AIR 1960 All. 484; Venkataramara v. Mysore, AIP 1958 SC 255. See M. Jain, Indian Constitutional Cases, 4th edn. (Bombady: N.M. Tripath Ltd., 1987), p. 853, cited in Greenawalt, Ibid.

[356] The patent unfairness of such a possible rule gives support to Hart's claim that "we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives." *The Concept of Law*, p. 125

> judges should be entrusted with law-making powers to deal with disputes which the law fails to regulate may be regarded as a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them such as reference to the legislature; and the price may seem small if judges are constrained in the exercise of these powers and cannot fashion codes or wide reforms but only rules to deal with the specific issues thrown up by particular cases[357].

The transaction costs and efficiency of alternative institutional means are certainly important if as we've concluded indeterminacy is a highly likely, though not strictly a necessary phenomenon[358]. More needs to be considered before we affirm the solution of judicial development of the law to the indeterminacy problem. And certainly more needs to be said before we can agree fully with Hart's gloss on the above: "the delegation of limited legislative powers to the executive is a familiar feature of modern democracies and such delegation to the judiciary seems a no greater menace to democracy."[359]

3. The Indeterminacy of Constitutional Moralities

Legal positivists are committed to the thesis that all law has social sources. Unlike many natural lawyers, positivists hold that legal validity is dependent on social facts. There is a major rift between positivists, however, over whether moral considerations can affect the validity of a rule adopted by correct law-making procedures. Those who believe morality can affect legal validity are inclusive legal positivists; those who deny this as a conceptual possibility are exclusive legal positivists. Both sides agree that law is a social construction, but disagree about whether morality is relevant to determining which parts of the construction count as law. The disagreement often centers on how to describe constitutional regimes with bills of rights as they contain apparent moral constraints on what counts as law. We need not solve this question here, but note that Waluchow's CCM account of constitutional norms seems to rely on an inclusive positivist account of law.

Positivists are not necessarily committed to any particular normative theory of adjudication, or even a descriptive theory if one only considers the sources thesis. Raz notes that "the sources thesis by itself does not dictate any one rule of interpretation. It is compatible with several."[360] A positivist account of legal sources is compatible with several interpretative rules or theories; the choice of a theory of interpretation depends on the features of the legal system it is used to interpret. Inclusive positivists see the invalidation of legislation by constitutional courts on moral grounds as sufficient reason to treat the moral provisions of bills of rights as part of the criteria of legality in those

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[357] *The Concept of Law*, 2nd Ed. (Oxford: Clarendon, 1994), p. 275

[358] The logical possibility of a complex gapless legal system is one thing, if it would function in practice quite another.

[359] *The Concept of* Law, n. 357 above, p.275.

[360] *Ethics in the Public Domain* (Oxford: Clarendon, 1994), p. 233.

systems. As I noted in the last chapter, Waluchow's inclusivist descriptive project can be seen as continuous with his justificatory one. Constitutional systems have tests for the validity of law that include consistency with constitutionally protected rights. These systems also claim to be democratic. His theory of adjudication is simply trying to find a not too counterfactual way of finding out if the practices and goals are compatible.

According to Waluchow, bills or charters of rights are best viewed as devices for dealing with our limited knowledge of how government action affects our moral rights[361]. These moral rights are commonly recognized as important by an overlapping consensus, but their exact nature is often debated so it is best to have to courts incrementally flesh out these notions in the context of concrete disputes. Common law reasoning is a good method for this sort of development and the insulation of the court from political pressures makes it the best institution to protect minority rights that would be at risk in Waldron's system of parliamentary supremacy. Courts are thus more democratic then a potential legislative tyranny of the majority. In short, "Charters represent a mixture of only very modest pre-commitment combined with a considerable measure of humility"[362], as opposed to the formerly dominant image of bills of rights as tying Ulysses to the mast.

In Waluchow's theory of adjudication, judges will focus on "the general principles and values to which most citizens are actually committed" in a test of reflective equilibrium not a knee-jerk response given to pollsters[363]. Moral norms to which charters make reference are objective. The norms are not those of the moral realist, or of personal morality or the dominant moral views of the community, but of the *community's constitutional morality*[364]. These norms are the true commitments of the community's political morality that through collective action have been legally incorporated and are thus accessible to judicial reasoning[365].

As we've seen so far in this thesis, this is an attractive theory in that it is not wildly counterfactual in its views on the nature of constitutional norms or on judicial abilities and it enables us to see the potentials of a key political institution. Waluchow's claim that judges can enforce a community's true moral commitments, however, does not adequately address the problem of indeterminacy.[366] The norms judges rely upon to make decisions have a strong democratic pedigree, but it is not clear that they adequately guide judges to make decisions that have a comparable democratic character.

Expanding the range of legal sources to include moral rights grounded in a legally incorporated intersubjective consensus creates new indeterminacy problems. Coleman and Leiter write that "moral principles that are supposed to enrich the domain of legal sources will, themselves, contain vague predicates--namely, moral ones"[367]. Expanding

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[361] *Common Law Theory* p. 11.
[362] Ibid., p. 10.
[363] Ibid., p. 224.
[364] Ibid., pp. 226-7.
[365] Ibid., p. 227.
[366] Waluchow has taken account of indeterminacy elsewhere, see chapters 7 and 8 of *Inclusive Legal Positivism,* but chapter 8 which is explicitly on indeterminacy considers indeterminacy stemming from H.L.A. Hart's account in *The Concept of Law*. Hart's arguments are about semantics and indeterminate intentions., not maintaining the democratic status of judicial decisions
[367] "Determinacy," p. 217.

the authoritative standard or sources of law will diminish indeterminacy by increasing the amount of reasons to be drawn upon to produce a unique outcome, but we can never be sure of indeterminacy's elimination. Increasing sources will actually create new indeterminacy problems not only because of the concerns about vague predicates noted by Coleman, Leiter and Unger, but since there may be an excess of applicable, and possibly conflicting, standards to apply to a case and thus no uniquely warranted outcome[368].

In his earlier descriptive work Waluchow recognized the problem of indeterminacy in constitutional adjudication, but it is not much discussed in his later normative position. It is worth citing one relevant passage at length:

> Of course it is also part of our common understanding that standards of political morality such as one finds recognized in the Charter are sometimes subject to various kinds of indeterminacy. In cases where indeterminacy figures, judges are thought to play a leading role in shaping the contours of the political morality legally recognized in the Charter. They do so, as they do in any other area of law where indeterminacy is encountered, by exercising their discretion and creating new legal rights. The exercise of this discretion should be, and normally is, sensitive to the linguistic, philosophic, and historical contexts within which rights of political morality are rooted.[369]

Judges can certainly be sensitive to a variety of contexts and history, but that does not necessitate democratically legitimate decisions. If judges are using discretionary powers for indeterminate cases caused by conflicts in political morality then the new rights created in these situations might not have the democratically legitimate status needed to rebut a critic of judicial review even with the various contextual restraints. One need only look at one famous American case to see the problems for even the most scrupulous judge trying to be faithful to the deep normative commitments of her community.

In Dred Scott v. Sandford[370], the U.S. Supreme Court upheld the lawfulness of slavery, disallowed slaves from bringing suits, and denied that African-Americans were persons by a seven to two decision. Dred Scott was the slave of Dr. John Emerson, a military doctor who had travelled to and lived in various free and slave states, notably Illinois where slavery was illegal. Emerson's postings often changed and sometimes he would leave Scott and his family behind for months before sending for them at his new posting. After Emerson's death, Scott attempted to buy his freedom from the Emerson widow, but she refused. He later sued for his freedom in Missouri courts, which began a long process of victories, losses and appeals. Eventually, Irene Emerson left the case to her brother John F. A. Sandford, whose name now marks the infamous decision. Scott was ruled not a citizen but a slave under the Constitution and Missouri law so he could not properly bring suit, and the court carried through that implication to broader issues of slavery and citizenship. According to the Court, African-Americans were "beings of an

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[368] Ibid., p. 218.
[369] *Inclusive Legal Positivism* p. 159.
[370] 60 U.S. 393 (1856).

inferior order, and altogether unfit to associate with the white race, either in social or political relations and so far inferior that *they had no rights which the white man was bound to respect....*"[371] The court further described its method of interpretation as an attempt to find the original meaning: "The duty of the court is, to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted."[372] Though, as Justice Curtis observes in his dissent pre-revolutionary American blacks were citizens who could vote in some states.[373] The originalist cast of the majority opinion needn't worry us about its relevance to the common law theory of constitutional adjudication, because if it had been decided on CCM grounds a determinate answer would require making a political decision from conflicting precedents and principles.

This case comes from a young legal system with moral tests of legal validity and in this respect it's like the Canadian model Waluchow often uses as an example, if not a model, of a common law constitutional system. The case featured strong tensions between liberty and property rights at both the constitutional and state levels[374]. The court faced several strong controlling precedents. In Fletcher v. Peck[375], the Supreme Court had ruled there is a natural right to property; in Calder v. Bull[376], Justice Chase wrote that "no republican government could allow transfers of property that invade the vested right to property"; in Wilkinson v. Leland[377], Justice Story wrote that "We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state of the union."[378] Despite the Illinois laws forbidding slavery and allowing male blacks limited citizen rights, and the Constitution's protection of experimentation at the state level, Scott lost his case. The rights of property owners trumped the rights of people even though the case could have been decided according to either set of controlling principles which would have generated two very different and conflicting outcomes.[379] Scott represents an historical instance of the logical possibility of legal indeterminacy.

Strong property rights are not the only evidence showing that the Court's decision was one plausibly derived from the constitutional morality of the time, despite the existence of countervailing principles in state and federal law. If we accept that the vicious practices of whipping and other means of keeping slaves in line were not only allowed under the antebellum eighth amendment forbidding cruel and unusual punishment (and after) but were considered constitutional[380], then it seems they are part of

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[371] Ibid., 407.
[372] Ibid., 393.
[373] Ibid., 572-76.
[374] See Balkin and Levinson "13 Ways of Looking at Dred Scott," *Chicago-Kent Law Review* 74 (1999): 101-147, 106.
[375] 10 U.S. 87 (1810).
[376] 3 U.S. (3 Dall.) 386 (1798)
[377] 27 U.S. (2 Pet.) 627 (1829)
[378] Ibid., 658.
[379] See Robert Cover's *Justice Accused: Anti-Slavery and the Judicial Process* (1984), especially "Conflict of Laws" pp. 83-99 and "Judicial Responses" pp. 226-256, and Mark Graber's excellent *Dred Scott and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006).
[380] Colin Dayan's *The Story of Cruel and Unusual* (Cambridge, Mass.: MIT press, 2007).

the data of considered judgments in particular cases that judges must put into reflective equilibrium. Perhaps declaring African-Americans to be only property is the best explanation for that given set of data. The civil war did not create a new less iniquitous consensus either. After the war, there were numerous 'sundown towns', even in the North, where blacks could work during daylight but were legally compelled to leave by dark[381]. During reconstruction, many southern whites began to join white supremacist groups with under the table affiliations with the Democratic party and began to commit terrorist activities including killing congressional candidates[382]. In the post-war South, blacks were often picked up on trumped charges like loitering and then used as unpaid labour in work-camps in what many would call a government sanctioned neoslavery system[383]. The 13th amendment outlawing slavery and the 14th amendment guaranteeing the equal protection of the law were allowed to be gerrymandered through the complex federal authority structure and a lack of broad public support to stop the neo-apartheid practices.

This troublesome set of data is not fatal to Waluchow's theory of adjudication, but it illustrates an important feature of the relationship between adjudication and constitutional moralities. Norms with a democratic pedigree can conflict strongly without a legal directive indicating which is superior. The true moral commitments of Antebellum Americans on slavery was indeterminate, or as Allan Gibbard has aptly put it "Between right-thinking people and slaveholders, there could be no community of judgment on slavery."[384] Further, not all constitutional moralities are protective of minorities[385]; South Africa, The Confederacy and the Antebellum U.S. all had constitutions. The U.S. is the most interesting case of those three because it contained a tension of the high-minded and most wicked. The tension may not have amounted to a contradiction, for it is difficult to imagine a contradiction in the strict logical sense entering into the law. Contradictory directives rarely occur on the level of individual propositions. Most users of natural language can avoid unintentionally saying contradictory things in their own tongue; of course, a fatigued customer might order "a black coffee double double," but such blatant nonsense will not make it through the drafting stage of a bill. Conflicts, and more rarely contradictions, in legal codes spring from a combination of laws. Law in the era of American slavery and neoslavery poignantly manifests such possibilities.

Unlike Rawls's constructivism with hypothetical protagonists, there is not necessarily going to be a ranking of principles within a CCM since its genesis will be through a concatenation of legally entrenched normative propositions supported by consensus. The results of the combination will only contingently be consistent, and the consensus will not necessarily agree on their relative importance and ranking. Who is legally considered part of the consensus is also a problem. But, even if we grant that a society does not suffer unjust representative practices, the consensus-generated norms judges use will fail to guide fully for conceptual reasons.

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[381] James Loewen *Sundown Towns: A Hidden Dimension of American Racism* (New York: Touchstone, 2006).

[382] Stephen Budiansky, *The Bloody Shirt: Terror after Appomattox* (New York: Viking, 2008).

[383] Douglas Blackmon *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (New York: Doubleday, 2008).

[384] *Wise Choices, Apt Feelings* (1990), p. 239.

[385] *Common Law Theory*, p. 237.

Due to the need to weigh undetermined standards, principles, and judgments about particular cases without a higher-order ranking principle, reflective equilibrium tests necessarily include a subjective moment. I don't intend this remark as a trivially true rejection of legal formalism, but as a recognition that very different outcomes can be generated by this often aleatory moment in judging. Waluchow writes that through "the use of bottom-up, common law modes of reasoning, judges will be able to decide the unforseeable issues of constitutional morality that are certain to arise in ways that allow for incremental changes and improvements in the moral blueprint"[386] and that judges are best situated to "fill in the blanks that our moral blueprint leaves open"[387]. As we've seen from the American slavery cases, the blueprint metaphor is wanting. Lon Fuller similarly presents the building dilemmas of common law judges "who cannot make rules in advance, but must wait for the cases to come to him, suggests the analogy of a builder attempting to construct a house with no control over the arrival of his materials, so that the shingles come before the foundation stones and the chimney bricks arrive on the site before the flooring."[388] Fuller suggests that this problem of materials and directives is alleviated by the habit of basic problems coming to court early in its tradition, though that's a dubious assumption.

Judges filling in gaps in a blueprint will come to a conundrum when teasing out the conventionally constituted set of norms with a democratic pedigree. The blueprint may contain a gap that could be plausibly filled in two incommensurable ways or demand that these incommensurabilities both be enacted leaving an Escher-like foyer in the heart of constitutional law. In trying to avoid vertiginous decisions, judges know they must choose but the legend of a CCM may provide nothing but conflicting sets of directions that must be solved by discretion that allows one set to trump the other. Such tension can lead to tragedies like Dred Scott, and point to the problems of the court solving deep social tensions where opposing parties can both rely on legal principles. If these disagreements run deep then we see that Fuller is right to note that the common law "is a system badly suited to dealing with societies undergoing rapid change. Its leisurely methods of development unfit it for dealing with conditions of emergency."[389]

4. *Jus Gentium* or Should We Glance at the Better Angels of Their Conventions?

This section investigates what has the air of potential remedy to what for the defender of judicial review must be the distressing conclusions above. Waldron has recently advanced a defense of citing foreign law in U.S. constitutional interpretation[390]. His defense of looking to foreign law is consonant with the account of the contingent character of constitutional moralities described in the last chapter. Foreign law might also solve indeterminacy problems. Waldron identifies the practice of judges looking to other legal systems as a modern version of the Roman law of peoples (*Jus Gentium*). *Jus*

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[386] *Common Law Theory*, p. 235.
[387] Ibid., p. 234.
[388] *The Anatomy of Law* (1968), p. 150.
[389] *The Anantomy of Law*, p. 172.
[390] "Foreign Law and the Modern *Jus Gentium*," *Harvard Law Review* 119 (2005): 129-146.

Gentium as use of foreign constitutional traditions could correct the risk that conventional political moralities share with algorithms: the potential of remaining stuck in a local optimum. Before quickly demonstrating why the plan falls to the same set of problems as CCM adjudication let us review the case.

Like pollution, "most ordinary moral reasons do not respect the boundaries of states in the appropriate way"[391]. Some American judges might hold that the death penalty, for instance, is wrong in all places and thus look for ways to forbid it, including looking to the decisions of systems that disallow it. Although this practice has emerged in American law, the judicial explanation of this interpretive practice has so far been thin[392]. In the academy, some liberal thinkers have found justification of it in Trevor Allan's claims that there is a "general commitment to certain foundation values that underlie and inform the purpose and character of constitutional government...imposes a natural unity on the relevant [common law] jurisdictions" thus common law jurisdictions "should, to that extent, be understood to share a common constitution."[393] Stated this baldly, there is much to disagree with. The common law method does not entail comparing with other systems since the social propositions judges rely on can be circumscribed within a system. That all common law systems share the same constitution is a spurious identity claim. The systems likely share some basic contents, notions and the tendency to incorporate moral rights into tests of legality. The particular set of rights recognized, the institutional powers of government and the form of democracy, however, differ in ways substantive enough to make an assertion of a common constitution too hasty.

Waldron does not look for justification so quickly, instead he tries to account for the authority of foreign law, e.g. is it conclusive or merely persuasive? What are the relevant domains in the legal system subject to foreign comparison and which foreign systems are to be used for comparison?[394] The account of authority Waldron gives is rather broad. He argues that there is a sort of international legal and moral consensus called the *Jus Gentium*, which he borrows from Roman law. It is the laws of nations, but not international law; it is not natural law, but rather "a sort of consensus among judges, and lawmakers around the world," a common law of mankind on general areas of law like contract, property, crime and tort[395] . Since law of nations is not natural law it is publicly available and judicially accessible and can change and evolve[396]. Commonality, however, might merely have been needed for the Roman empire and this jurisprudence helped facilitate it. But the variety of communities governed still meant that if the consensus of the *Jus Genitum* was "to function normatively, it had to be less than complete"[397] so that it left room for particular choice and extension and enrichment of the

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[391] Leslie Green *The Authority of the State* (Oxford: Clarendon, 1988) p. 228.

[392] See Sujit Choudry "Migration as a New Metaphor in Comparative Constitutional Law," in *The Migration of Constitutional Ideas* Ed. Sujit Choudhry (New York: Cambridge University Press, 2007), p. 3 for a list of examples.

[393] *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) pp. 4-5.

[394] "*Jus Gentium,*", 129.

[395] Ibid., 131.

[396] Ibid., 133-4

[397] Ibid., 136,

consensus. Waldron here draws an analogy between jurisprudential and scientific knowledge. The *Jus Gentium* represents "the accumulated wisdom of the world on rights and justice," so the incomplete consensus becomes a process of accumulating wisdom "in the sense of overlap, duplication, mutual elaboration, and the checking and rechecking of results that is characteristic of true science."[398]

A *Jus Gentium* approach to deciding cases could be beneficial for two major reasons. First, it would limit parochialism due to contingent contents and stasis created by partisan judicial appointments[399] by estranging some of the nation's conventional moral practices. Thus, it might weaken what Sunstein calls ideological amplification, or the tendency of a group to take a more extreme position when it is self-selected to be composed of only relevantly like-minded members[400]. Second, democratic decision makers can see gaps through normative comparison of other constitutionalist traditions and redress the contingent moral contents of their system. Also, it's worth noting the merger domestic and other law the label 'foreign' belies. *Jus Gentium* may not be foreign because "as a dense and mutually reinforced consensus, it may have a pertinence to our law that its individual constituents do not have. This fact means that *Jus Gentium* may not be 'foreign' in the objectionable sense in which the constituent elements of it are foreign."[401]

That all said, foreign law citation of systems with similar constitutional moralities cannot achieve the aim of being democratic. As noted earlier, other systems have different institutional structures, rights provisions and amendment procedures and the public-mindedness which generates norms can also vary. Language differences may hide conceptual differences, as might common language. The similarity of content and form is not identity. The norms employed, whatever their comparative moral worth, would lack a democratic pedigree. Judges also lack the competence to assess many of the decisions of foreign legal system. It might still be a good source for reasons, but it would require much wider equilibrium and competence to assess and balance multiple constitutional moralities. The more mundane objection that the class of legal reasons would be greatly extended and judging would be far more difficult to do adequately is also pertinent.[402] Despite the central legal element to this method, when judges try to harmonize with foreign legal systems it likely "in practice means with the judge's ideal system, as no real legal system has a unitary spirit or common set of values."[403]

5. Other Justificatory Considerations: The Services of Courts

After careful examination of how judges would access and apply a CCM under Waluchow's theory of adjudication, we see that it cannot live up to its democratic billing at the level of results because judges must exercise subjective judgment that won't

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[398] Ibid., 138, 138-9

[399] Jack Balkin and Sanford Levinson "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *Fordham Law Review* 75 (2006): 101-45.

[400] Sunstein "Ideological Amplification," *Constellations* (2007) 144.

[401] "*Jus Gentium,*", 145.

[402] Posner, *How Judges Think*, p. 349.

[403] Ibid., p. 366.

necessarily accord with the true moral commitments of the community. But is that grounds for rejecting the theory? It does seem to show a failure of some state charters to live up to their espoused goal of making the people ultimately sovereign. To say that judicial review of constitutional rights provisions produces undemocratic results is not however to say that it's unjustifiable. As we saw earlier with Hart, courts can be supported on other grounds. Having begun this thesis with the goal of filling out a sketch, I'd like to close by sketching a case for CCM adjudication even if it's not strictly democratic because of problems of ascertainment, subjective elements of application, and insufficient participation in the construction of its sources.

Judges employing a CCM style of adjudication under good faith would simulate informed and concerned democratic results. The judicial expertise in speculation and locating abstract principles in a series of particular disputes would often lend their emulations a conservative cast, but only in the sense of relying on the past. A government body here might perform a great service of saving the public a great deal of strife by constitutionalizing an issue and then providing moral argumentation to back its decisions. Such a view of courts would make the public more comfortable with overriding court decisions, but if it's done on considered grounds that recognize judges' reasoning as attempts to find the true voice of the community and not purely their arbitrary preferences then sometimes the decisions will be correct, or close enough, and the judicial service would be valuable.

It's easy to for legislatures to enact conflicting laws, and it's clearly desirable to have an institutional check upon those situations. Like doctors, lawmakers can work long hours and misapply their craft. We are no doubt glad that pharmacists can refuse to grant a prescription if a doctor has made a mistake and ordered a combination that will cause a heart-attack. The effects of conflicting, though well-meaning, laws can be far more catastrophic than an individual case of heart failure and it's sensible to have an institution to review what encumbered citizens take to be these cases. The problem is that the notion of health underlying such overrides is less in dispute than the ills caused by conflicting laws, but there seems to a case to be made for granting judges a review power here due to their unique knowledge of law as a system. The review power does not have be strong, but some institutional check appears justified.

Some might desire stronger courts powers despite conflicts in constitutional moralities due to the difficulty of amending a constitution. We're stuck with amendment formulas that might be unjust in granting disproportionate powers to less populated states or provinces in a federal system so some people's vote counts more. There are further general features of collective action problems that would impede even an equal system. Olson argues that unless a group is small or there is a coercive mechanism, i.e. financial, involved to make individuals act in the collective interest then "*rational, self-interested will not act to achieve their common or group interests.*"[404] Courts might here help this collective action problem by looking at social practices that might have an underlying set of norms. The public group involved might either be unable to have made a constitutional amendment or felt it superfluous, but courts can help minority groups overcome

[404] Mancur Olson *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1965), p. 2 (emphasis in original).

collective action problems and formal amendment obstacles[405].

Minority groups might also have difficulty changing the moral consensus needed for the majority to vote for an amendment. As Gilbert Harman notes "Once a body of conventional morality has been established, it becomes relatively difficulty to modify."[406] If our political morality is largely a product of entrenched constitutional norms that people support for different reasons then a new amendment is like opening a bargaining session. Sometimes extensions of given agreement will be uncontroversial and easy, but sometimes not and tense bargaining will have to ensue.[407] Courts can provide a service in these instances by extending terms of agreement gradually with reasons they defend in public. Constitutional review can here provide an educative function by showing parties how to engage in moral reasoning and eliminating potential strife[408]. In this sense, it is less like a directly democratic institution than a great Royal Commission. The non-ideal nature of our inquiry and its limited scope make the following addition to that argument insufficiently grounded, but it appears to have some plausibility. If courts had to refer every case of unconstitutionality or indeterminacy back to the legislative branch for a democratic resolution then transaction costs would be greatly increased and the character of legislative institutions would be altered[409].

We've seen that there are some other considerations that seem to lean towards favouring a CCM theory of interpretation which grants judges discretionary powers. The arguments from the circumstances of rule-making argument and democratic compatibility arguments may not intersect sufficiently[410], but "unless our current practices are to be rejected wholesale, the common law model" may be "the best way to understand what we are doing; the best way to justify what we are doing; and the best guide to resolving issues that remain open."[411]

There is still, however, the worry about the rhetoric of 'true moral commitments' and 'authenticity'. If the conclusions above about the need for subjective judgment in applying a constitutional morality are true then these terms are misleading. In endorsing a form of common law reasoning, we should keep the old Bethamite worries about judges using terms like 'reasonableness' to strike down legislation, because it may only be unreasonable by their own lights. If we change this rhetoric we will likely have to change some of the ways we deal with adjudication in societies like ours. Citizens could be less reticent about using constitutional amendments and it would be reasonable to ask judges openly about their moral and political views during confirmation hearings. We are now aware that the famed analogy Chief Justice John Roberts drew at his appointment hearing

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[405] Frequent amendments are also empirically correlated with unstable constitutions. See Donald Lutz "Toward a Theory of Constitutional Amendment," *American Political Science Review* 88 (1994): 355-370.

[406] "Moral Relativism," in Gilbert Harman and Judith Jarvis Thomson *Moral Relativism and Moral Objectivity* (Cambridge, Mass.: Blackwell, 1996) p. 23.

[407] Gilbert Harman *Explaining Value and Other Essays in Moral Philosophy* (Oxford: Clarendon, 1999) p. 72.

[408] On the educative function of court decisions see *Inclusive Legal Positivism*, p. 132.

[409] Ibid., p. 252 and *Common Law Theory*, n. 4 above, p. 223.

[410] Sumner "Politicians, Judges, and the Charter," *Canadian Journal of Law and Jurisprudence* 21 (2008): 227-238, 237.

[411] David Strauss "Common Law Constitutionalism," *University of Chicago Law Review* 63 91996): 877-935, 888.

is false. Constitutional judges are not simply baseball umpires applying the laws of balls and strikes. Unlike judges, umpires lack the discretionary powers to redefine the strike zone. And since judges have such powers we should know where they'd draw lines.

6. Tallying Up

This thesis set out to test if a claim about a key government institution frequently made by its defenders is consistent with the values it is supposed to uphold and protect. Through an examination of Waluchow's state of the art account of judicial review we've seen that claims that judicial review is democratic fall short. The indirect democratic justification of constitutional courts runs up against intractable problems of their limited fact-finding powers and that they must apply indeterminate values. Settling cases by a constitutional morality gives judges a source with a democratic pedigree, but not necessarily democratic outcomes. Plus, even if the method of constitutional interpretation sketched in these essays were applied the lack of popular participation in decisions makes attributions of democracy suspect. Raz's warnings about the illusions of a rich consensus are justified; claims that democracy and judicial review are compatible are not.

If we return to the criteria set out in the first chapter, the results of our inquiry may seem largely negative. The means analyzed and tentatively recommended, albeit with further justificatory grounds, are not adequate to their aim; judges can but simulate a reflective collective decision. Also, the narrow focus on one type of government institution stops us from making any confident reformist policy proposals because we have yet to analyze adequately the systems of government and societies in which it operates. Thus we are not in a sturdy position to know if there are alternative suggestions that are would be more viable, efficient and effective.

The attempt to respond to Waldron's criticisms of judicial review has, however, illuminated some elements of constitutional practice. Rights provisions of constitutions seem well explained as results of legal procedures and intersubjective agreement, though it does not fully explain rights. Judges also have a relevant expertise to access and apply those sorts of norms. Their expertise is imperfect and the norms can be indeterminate, thus we recognize that the democratic justification of judicial review must be elsewhere or unavailable.

The anomalous mixture of description and normativity found in a theory of adjudication has therefore not been stifling. A skeptic might be tempted to say here that our negative results and limited proposals for reform are evidence that "Normative theory changes nothing"[412]. But that would be premature. We have some notion of where to explore further in order to explain why liberal democrats desire constitutions and test if that desire is justified according to their purportedly central values. The patient exploration of one theory of adjudication has also shed light on certain general jurisprudential debates about the possibility and value of moral tests of legality. Further, by showing the immense complexity of the constitutional judge's task we've cast doubt

[412] Brian Leiter "Marxism and the Continuing Irrelevance of Normative Theory. Review of 'If You're an Egalitarian, How Come You're so Rich?' By G.A. Cohen," *Stanford Law Review* 54 (2002): 1129-1151, 1151.

upon Hart's claim that "A judicial bench is not and should not be a professorial chair."[413] Finally, it's been demonstrated that such complexity and deep social conflicts are ill-suited for each other if courts are to make their normative pronouncements effective. As James Thayer observed long ago, "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."[414]

[413] H.L.A. Hart *Punishment and Responsibility* (Oxford: Oxford University Press, 1967), p. 2.
[414] "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 8 (1893): 129-156, 156.

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