RIGHTS, RULES, AND DEMOCRACY**

DIREITOS, REGRAS E DEMOCRACIA

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Abstract: Democracy require protection of certain fundamental rights, but can we expect courts to follow rules? There seems little escape from the proposition that substantive constitutional review by an unelected judiciary is a presumptive abridgement of democratic decision-making. Once we have accepted the proposition that there exist human rights that ought to be protected, this should hardly surprise us. No one thinks courts are perfect translators of the rules invoked before them on every occasion. But it is equally clear that rules sometimes do decide cases. In modern legal systems the relative roles of courts and legislators with respect to the rules of the system is a commonplace. Legislatures make rules. Courts apply them in particular disputes. When we are talking about human rights, however, that assumption must be clarified in at least one way. The defense of the practice of constitutional review in this article assumes courts can and do enforce rules. This article also makes clear what is the meaning of "following rules". Preference for judicial over legislative interpretation of rights, therefore, seems to hang on the question of whether or not judges are capable of subordinating their own judgment to that incorporated in the rules by their makers. This article maintains that, in general, entrenched constitutional rules (and not just constitutional courts) can and do constrain public conduct and protect human rights. The article concludes that the value judgments will depend on our estimate of the benefits we derive from the process of representative self-government. Against those benefits we will have to measure the importance we place on being able to live our lives with the security created by a regime of human rights protected by the rule of law.

Keywords: Democracy. Human Rights. Rules. Judicial Review.

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Resumo: A democracia exige proteção de certos direitos fundamentais, mas podemos esperar que os tribunais sigam as regras criadas pelo poder representativo? Parece dificil recusar a proposição de que o controle substantivo da constitucionalidade das leis, praticado por um sistema judiciário não eleito, é uma simplificação da tomada de decisão democrática. Todavia, se existem direitos humanos que devem ser protegidos, isso não deveria causar estranheza. Em modernos sistemas jurídicos o papel dos tribunais e dos legisladores com relação às regras do sistema é um lugar-comum. Legislativos fazer regras. Tribunais aplicam-nas em disputas particulares. Quando estamos a falar de direitos humanos, no entanto, essa premissa deve ser esclarecida. Este artigo oferece uma defesa da prática de revisão constitucional pressupondo que os tribunais podem e cumprem regras. O artigo também deixa claro qual é o significado de "seguir regras". A preferência pela interpretação judicial em vez da legislativa parece pairar sobre a questão de se existem, ou não, juízes capazes de subordinar o seu próprio julgamento ao que foi incorporado nas regras pelos seus criadores. Este artigo sustenta que, em geral, regras constitucionais (e não apenas os tribunais constitucionais) podem limitar a conduta pública e proteger os direitos humanos. O artigo conclui que os juízos de valor dependem da estimativa dos benefícios que derivam do processo de auto-governo representativo. Contra esses benefícios será preciso medir a importância dada à capacidade de viver com a segurança criada por um regime de direitos humanos protegido pelo Estado de direito.
Palavras-chave: Democracia. Direitos Humanos. Regras. Controle de Constitucionalidade

1 Introduction

More and more, the protection of human rights in the world is a matter of declaring the rights in a written constitution and making that constitution enforceable against the state in some kind of law court. The propriety, of this model, however, has never ceased to be the object of intense political and scholarly criticism. Such criticism is rarely based on serious disagreement with the underlying goal of protecting rights. It is usually agreed that certain human activities should be enabled or allowed to proceed without interference and, as a corollary, that the state—and other actors—should be obliged to undertake or be disabled from certain conduct. Instead, the critics dispute the assumption that this goal is best effectuated through a grant of reviewing power to unelected courts. A society respectful of human rights, these critics contend, could and should leave its government in the untied hands of elected legislatures.

In this essay I deal with these issues generally rather than with respect to one or another particular legal system. I cite constitutions, institutions, and academic commentary from several jurisdictions. Necessarily, these references reflect the particular historical experiences in which they were created and their relevance must be qualified accordingly.[1] I conclude that views on this question turn critically on one feature; the understanding of what courts are doing when they engage in constitutional judicial review. If they are understood as making fresh political judgments on the issues before them—when they are seen as legislating—it is hard to defend their authority in competition with that of the elected

[1] For a useful caution on the need for context in evaluating constitutional designs, see W. Sadurski, *Judicial Review and the Protection of Constitutional Rights*, (2002) 22 Oxford Journal of Legal Studies *275*.

legislature. In contrast, when constitutional judicial review is seen as the application of pre-existing rules of law, a far more persuasive case can be made.

2 Roles of courts and legislatures

Answers to difficult problems of legal theory start (and sometimes end) with definition. Our terminology, necessarily, is stipulated and, consequently, somewhat arbitrary. When considering the relative roles of courts and legislatures in the protection of human rights, the most obvious definitional issue is the meaning of "human rights."[2] For my purposes, we may use a definition that is 'thin' enough to cover a broad range of approaches. In particular, it will be unnecessary to deal with the complicated issue of what makes a right a "human" right. That question turns mainly on the scope of application of the right with respect to time, culture, and geography.[3] I will assume that these standards have been settled and that, therefore, a basis exists for determining (or contesting) the particular substantive content of these rights. Equally critical for my purposes, a human right – like any right – supposes some model of appropriate behavior between the right-holder and some actual or potential right-violator. That is, to say X "has a right" means that, in some specified set of circumstances, someone must do something for X (positive rights) or refrain from doing something to X (negative rights). Positing a right is thus another way of prescribing desired behavior in specified circumstances. I labor this point to emphasize the inevitable conclusion. To say that there is or ought to be a right is necessarily to say that there is or ought to be a *rule* about the conduct or status of the right-holder and some other person or persons.[4]

Once we recognize that the issue under consideration involves the creation, interpretation, and application of rules, it may appear in a different light. In modern legal systems the relative roles of courts and legislators with respect to the rules of the system is a commonplace. Legislatures make rules. Courts apply them in particular disputes. When we are talking about human rights, however, that assumption must be clarified in at least one way. The most prominently recognized potential violator of human rights is the state. If we include within the term

[2] E.g. H. Steiner and P. Alston, International Human Rights in Context: Law, Politics, Morals (Oxford: Oxford University Press, 1996), 167–80.

[3] *See, e.g.* C. Powell, *Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights. Introduction: Locating Culture, Identity, and Human Rights*, (1999-2000) Columbia Human Rights Law Review 201.

[4] F. Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford: Oxford University Press, 1991), 64 (a "rule is explainable in terms of a paired relationship between a behavior within the extension of a rule-formulation and the behavior that takes place"). Although it is not essential to my argument here, this seems true not only with respect to legal rights but also to natural or moral rights. The rules in those cases are the rules of nature or of the deity or of any other guide to right behavior. Thus, human rights may arise in opposition to an established system of positive law rules when it is alleged that those rules violate a superior rule specifying the proper conduct of the challenged state rule-maker. The use of the terminology of rights always assumes some entity (some person), real or postulated who ought or ought not to do something with respect to the right-holder.

"state" all of its makers of decisions and holders of power, then human rights must be held against the legislature as well as against other potential violators. It is, therefore, implausible to see the legislature as possessing the power to make and unmake the rules that define these rights. Indeed, it is something of a contradiction in terms to claim certain rights against the state but then to vest in the state the power to say what those rights are. But this does not mean that the ordinary division between legislation and adjudication cannot be employed in this context. The rule-maker in these circumstances must merely be external to the persons and entities subject to the rules. The Western response to this fact has been to resort to a special, constituent form of legislation, one anterior to the state institutions to be governed. This process produces constitutions as a higher level of law. Once such a constitution is in place, the ordinary allocation of authority between the (constituent) legislature and the courts may be deployed. The job of the courts is to interpret and apply the rules so created in claims against alleged rights-violators including the ordinary legislature. The result is the familiar system of constitutionalism where courts enforce the constitution against the rest of the government.[5]

The practice of constitutional judicial review of legislation thus appears to be built into the very idea of entrenching human rights in rules of law. At this point, a persistent source of discomfort appears. The idea of constitutional restraint is most prominent in exactly those societies where political legitimacy is tied to the representative character of the state decision-makers. Judicial enforcement of rights against the legislature in such state, however, is an abridgement of democratic government. The classical statement of the problem in the United States is Alexander Bickel's contention that "judicial review is a counter-majoritarian force in our system," a "deviant institution."[6] The political actors policed by the courts are elected and subject to re-election. The judges (usually) are not. This "counter-majoritarian difficulty" has famously vexed commentators on constitutional review, especially those in the United States. Barry Friedman does not exaggerate when he refers to this concern as the "central obsession of modern [American] constitutional scholarship."[7] A principal project of academic writers has been to reconcile democracy and judicial review. None of these attempts has been entirely successful.

One common democratic defense of judicial review is a simple redefinition of democracy to include the enforcement of human rights norms against the decisions of legislatures. In one of the best-known examples (written before Bickel's formulation of the problem) Eugene Rostow candidly employed a "personal definition of the crucial term". Even in democracies, he noted, some discretionary authority must be granted to unelected officials. Therefore, "[i]t is error to insist that no society is democratic unless it has a government of unlimited powers and that no government is democratic unless its legislature has unlimited powers."[8]

[5] *E.g.* Marbury v Madison 5 US (1 Cranch) 137 (1803).
[6] A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis: Bobbs-Merrill, 1962), 16, 18.
[7] B. Friedman, *The History of the Countermajoritarian Difficulty. Part One; The Road to judicial Supremacy*, (1998) 73 New York University Law Review 333, 335.
[8] E. Rostow. *The Democratic Character of Judicial Review*, (1952) 66 Harvard Law Review 193, 199.

Perhaps unsurprisingly, redefinition of democratic government so as to include a reviewing power by the courts is a favorite device of constitutional judges. Chief Justice MacLachlin of the Supreme Court of Canada put the proposition baldly. With the advent of constitutions "[d]emocracy was no longer just majority rule. Democracy also required protection of certain fundamental rights."[9] Judge Abella then on the Ontario Court of Appeals, was even more forceful in identifying judicial enforcement of rights with democracy: "Since rights and participation define democracies," criticism of judicial review "come[s] down to the proposition that we have too much democracy and too many institutions to enforce it."[10]

3 Democratic quality of judicial review

I have already noted that definitions in these kinds of matters have a necessarily arbitrary element. Without claiming that these supplemented definitions of democracy are "wrong", we can note that, by themselves, they are unlikely to assuage democratically motivated critics concerned with the character of constitutional adjudication and the unelected status of the judges who issue them. These expressions are proof of George Orwell's observation that any attempt to pin down a definition of democracy "is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it; consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using that word if it were tied down to any one meaning."[11]

Some specific attempts to re-frame judicial constitutional review as consistent with democratic governance are premised on the democratic character of the constitution-making process and on the possibility of constitutional amendment. Alexander Hamilton, in *The Federalist*, no. 78, insisted that judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes the power of the people is superior to both …"[12] More recently Dieter Grimm, then a judge on the German Constitutional Court, argued that "if the people decides to check government power vis-a-vis the citizens through fundamental rights, enforcement of such rights against a ruling majority can hardly be regarded as anti-

[9] B.MacLachlin. *The Supreme Court and the Public Interest*, (2001) 64 Saskatchewan Law Review *309*, 313.

[10] R. Abella, *The Judicial Role in a Democratic State*, (2001) *26* Queen's Law Journal 573, 574. 577; For similar judicial expressions see A. Barak, Judicial Discretion (New Haven: Yale University Press, 1989) 195–6; J. Limbach. *A Concept of the Supremacy of the Constitution*, (2001) 64 Modern Law Review 1, 3; Vriend v Alberta [1998] 1 SCR 493, paras 134, 142 (Cory, J.) (noting that the adoption of the Charter of Rights and Freedoms effected a "redefinition of our democracy" and that "judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with democratic principles mandated by the Charter").

[11] G. Orwell, *Politics and the English Language* in his Collection of Essays (New York: Harcourt Brace Jovanovich, 1953) 156.

[12] A. Hamilton, The Federalist, ed. C. Rossiter (New York: New American Library, 1961), No. 78, pp. 464, 468.

-democratic."[13] It may be accurate to characterize an original constitution-making process as democratic, although, in the case of the United States, this is a matter of substantial doubt. But the passage of time corrodes any such claim as the human beings represented in the constituent events are replaced by new generations. References to an old constitution as the mandate "of the people" are at best rhetorical since the binding force of long-lived constitutional rules cannot really be regarded as self-imposed.[14] Nor, in the ordinary case, does the possibility of popularly initiated or approved amendments change the situation. In most constitutional systems, the procedure for amending the constitution is designed to frustrate the will of a transient majority, even a substantial majority.[15] It may be that requiring an exceptionally intense expression of democratic preference to make or change a constitution means that the resulting constitutional rules reflect the will of "the people" in some more authentic sense. But, as was the case with the prior examples, this reconciliation depends on a redefinition of democracy that fails to speak to the disfranchisement of current majorities that concerns the critics of judicial review.[16]

It is true that there is no thorough democracy if that means that every choice and every action taken by the state is reviewed and approved by the majority of the competent population. But recognizing the necessarily mixed character of any practical definition of democracy does not alter the fact there are some forms of public decision-making that are more responsive than others to the expressed preferences of a majority of the citizenry. 'The whole:, Bickel observed, "operates under public scrutiny and criticism" and "a representative majority has the power to accomplish a reversal."[17] That is designedly not the case with judges exercising the power of judicial review, and their actions may thus be said to be *less* consonant with democratic decision-making than that of other unelected holders of power.

A last argument for the democratic quality of judicial review is more challenging. It notes the existence of some minimal social and political preconditions for the continuing exercise of democratic authority. There can be no representative democracy without free and fair elections. Such elections cannot be a meaningful gauge of popular sentiment unless it is possible to engage in reasoned discussion of the choices facing the state. Should an elected legislature subvert these conditions, the prospects for the survival of democratic decision-making would be seriously jeopardized. Consequently, preventing interference with these conditions, even interference by elected representatives, is not inconsistent with respect for democratic decision-making. This is more than a hypothetical concern,

[13] D. Grimm, *Constitutional Adjudication and Democracy*, (1999) 33 Israel Law Review 193, 198; see also p. 197; *Vriend v Alberta*, n, 10 above, paras 134–42.
[14] *See* M. Klarman, *Antifidelity*, (1997) 70 Southern California Law Review 381, 392-3; J. Waldron, Law and Disagreement (Oxford: Oxford University Press, 1999), 271–4.
[15] S. Levinson (ed.), Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Princeton: Princeton University Press, 1995)
[16] *See* B. Ackerman. *The Storrs Lectures: Discovering the Constitution*, (1984) 93 Yale Law Journal 1013. *Compare* K. Whittington, Constitutional Interpretation: Textual Meaning. Original Intent and Judicial Review (Lawrence: University of Kansas Press, 1999), 132–4.
[17] Bickel, n. 6 above, 17.

as evidenced by the fate of the Weimar democracy in Germany.[18] In a much--remarked argument, John Hart Ely made the case for "representation-reinforcing" judicial review and attempted to explain many of the constitutional decisions of the United States Supreme Court in terms of that approach.[19] Ronald Dworkin has made a much broader argument based on the same kind of reasoning. Eschewing a "statistical" concept of democracy, he has insisted that "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." Such government assumes the existence of certain "democratic conditions" assuring "the equal status of all citizens". So legislation excluding members of certain races from public office would be inconsistent with democratic principles and action by an unelected judiciary that invalidated such a law would "protect and respect [those principles] better" and would be "no matter for moral regret."[20]

Unless we take a moment-to-moment model of democracy, it is hard to resist the argument that some constraints to preserve democracy are appropriate limits even on otherwise democratically impeccable decisions. Once we agree to protect a democratic system *over time*, that is, the intervention of an external guardian is appropriate for the purpose of maintaining things that are essential to preserve that system. But there are many kinds of state institutions and procedures that are all consistent with genuine representative government.[21] Therefore, the occasions on which legislation will offend on this basis must be extremely rare. This is even clearer when we recall that such legislation will, by hypothesis, issue from a process that is itself assumed to be democratic. In the hands of some of its proponents, however, the reach of the constitutional judicial review supposedly required for the maintenance of democracy is far greater. Dworkin finds judicial invalidation of legislative limitations on abortion, pornography, and euthanasia to be a logical inference from his "constitutional conception of democracy," an appropriation which might have astonished even Orwell.[22]

There seems little escape from the proposition that substantive constitutional review by an unelected judiciary is a presumptive abridgement of democratic decision-making. Once we have accepted the proposition that there exist human rights that ought to be protected, this should hardly surprise us. The founders of the American Constitution feared, first of all, legislative interference in personal liberty. "It is against the enterprising ambition of this [legislative] department", wrote Madison, "that the people ought to indulge all their jealousy and exhaust all their precautions."[23] The United States Constitution was "consciously was structured to confound effectuation of majority will".[24] The counter-majoritarian

[18] Grimm, n. 13 above, 791–2.
[19] J. Ely, Democracy and Distrust (Cambridge, Mass.: Harvard University Press, 1980).
[20] R. Dworkin, Freedom's Law (Cambridge, Mass.: Harvard University Press, 1996),17.
[21] J. Allan, *Liberalism, Democracy and Hong Kong*, (1998) 28 Hong Kong Law Journal 156, 160.
[22] Dworkin, n. 20 above, 17, 117–46, 214–26.
[23] Hamilton, n, 12 above, no. 48, pp. 308, 309.
[24] R. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, (2001) 95 Northvestern University Law Review 845, 848.

aspect of this system is a "difficulty" only if we have decided that any and every limitation of democratic decision-making is a cause for worry. If, on the other hand, democratic process is seen not as a transcendent value, but as one tool to be employed in the design and operation of a satisfactory social organization, its compromise with, and limitation by, other institutions designed for the same end is perfectly understandable.[25]

All of this is built into the very idea of human rights as rules for conduct, including—and perhaps especially—rules for the conduct of the law-making power. Nonetheless, a respectable body of commentary maintains that it is possible to hold both to a substantive view of human rights and to the idea that the definition, elaboration, and enforcement of those rights may be entrusted to electorally accountable officials including legislators. "There is no law of nature", Jeffrey Goldsworthy has written, "that legislatures can never be trusted voluntarily to comply with the deeper principles that confer and limit their moral authority …".[26] Jeremy Waldron has argued that "we should not underestimate the extent to which the idea of rights may pervade legislative or electoral politics".[27] Indeed, it has been suggested that the practice of judicial constitutional review may actually reduce the sensitivity of the elected agents of the state to the importance of respecting rights.[28] Waldron insists that the very idea of human rights presupposes that human beings are competent moral agents with the capacity to make critical choices affecting their own lives and the nature of the society in which they live. It is inconsistent with such a picture to disable the people from making their own decisions about the shape and application of rights. To do so would be to "consecrate forms of authority which are radically at odds with those entrusted to ordinary rights- bearers in the exercise and contemplation of their rights."[29] Submitting these matters to legislative judgment may have distinct advantages over entrusting them to an unelected judiciary, especially if we accept the inevitable controvertibility of questions associated with rights and, as a corollary, that these questions cannot have determinate answers.[30] On this view, the measures most consonant with human rights will be different in different circumstances and it would be unreasonable to privilege the resolution preferred by the constitution-makers. The determination of disputed issues concerning human rights comes down to a difficult and delicate matter of public policy. It has long been understood that legislatures possess certain resources for the investigation of and deliberation on such issues that courts lack.[31]

[25] E. Rubin, *Getting Past Democracy*, (2001) 149 University of Pennsylvania Law Review 711, 727 ("The tension between democracy and constitutionalism …can be resolved by simply acknowledging that they constitute two separate principles."); Whittington, n. 16 above, 44; M. Perry, Morality, Politics and Law (New York: Oxford University Press, 1988), 163–4.
[26] J. Goldsworthy, The Sovereignty of Parliament: History and Philosophy (Oxford: Oxford University Press, 1999), 257.
[27] Waldron, n. 14 above, 307; M. Tushnet, Taking the Constitution Away from the Courts (Princeton: Princeton University Press, 1999), 96–124.
[28] Goldsworthy, n. 26 above, 262–3;Tushnet, n. 27 above, 66.
[29] Waldron, n. 14 above, 254; see also p. 104.
[30] This crucial proposition is considered further below in text at nn. 47-54
[31] Goldsworthy, n. 26 above, 257, 262–3.

There is a sense in which this position is simply inconsistent with the notion of rights stipulated at the outset—that they necessarily contemplate rules of conduct for the treatment of individuals that bind—especially bind—the state. If we have further decided to vindicate those rights through law, it is hard to understand how the interpretation and application of the relevant rules can be committed to the representative agencies of the state. It is in the nature of a rule that it limits the choices of those subject to it.[32] Perhaps the supporters of this view hold a commitment to rights in a different sense. They may see a society committed to rights only as one where certain broad values are respected without any particular specification of how the application of those values will, play out in the conduct of individuals and institutions. In that case, the general promotion of the preferred values might be left to a democratically responsive legislature.

Such an expectation, of course, is at odds with the modern impulse to reduce the values that ought to inform state conduct to a set of well-defined rules—the impulse towards constitutionalism. That idea supposes that some aspects of state behavior should not be decided action-by-action, according to the all-things--considered judgment of the actors. Instead, they should be governed by abstract standards set out in advance.[33] Two reasons for this approach are particularly relevant in this context.

First, reliance on rules can control the tendency of human beings to exaggerate the relative importance, of their own interests as compared to those of other people. In law, this presumption underlies the fundamental maxim that no person should be a judge in his or her own cause. Legislators may find it difficult fairly to measure the utility of their own actions against the values associated with human, rights. Their very electoral accountability may induce them to give priority to shorter-term political considerations over principles whose pay-off will appear only over time and will, in any event, be hard to recognize and evaluate.[34]

The second advantage of acting according to fixed rules is its relative stability and clarity. The embrace of rights is an embrace of the idea that, in significant ways, individuals should be free to make decisions about their own lives. But no such individual autonomy is meaningful if it may be overturned at any time by a fresh state determination. It is no accident that totalitarian governments (in reaction to which much of the modern human rights movement was created) are associated with hidden mandates and surprise intrusions.[35] A common law maxim declared it a miserable slavery to live under unstable or unknown laws.[36] The model whereby human rights are embedded in fixed rules applied by the courts guards against this risk. That of continuing legislative articulation – by definition – cannot. Human rights, that is, go hand in hand with the rule of law.

[32] Schauer, n. 4 above, 51–2.
[33] Ibid.
[34] Grimm, n. 13 above, 202.
[35] R. Kay. *American Constitutionalism,* in L. Alexander, ed.), Constitutionalism: Philosophical Foundations (Cambridge: Cambridge University Press, 1998), 16, 22–3, 27.
[36] 4 Coke's Institutes 246.

These two issues have not gone unnoticed by the opponents of judicial enforcement of human rights against legislatures. Among recent commentators, Jeremy Waldron's responses are, perhaps, the most considered. Waldron finds no merit in the charge that the unconstrained legislature becomes its own judge with respect to the conformity of its acts with the relevant human rights norms. He assumes that the model of entrenched constitutional rights is a method by which a "people" pre-commits itself to the observance of certain standards.[37] It makes no sense to shut out the judgment of that people's representatives when deciding the concrete meaning of those standards: "The people are authorities—not judges in their own cause, but *authorities*—on what they have pre-committed themselves to."[38] This response presupposes that the "people" as represented in the legislature is the same "people" that legitimized the constitution. The theory of modern constitutionalism, however, is exactly the opposite. Both kinds of legislation, constitutional and sub-constitutional, derive their authority from popular sanction. But concomitant with the decision to entrench is a decision to commit the making of constitutions to special and irregular procedures designed to establish an expression of the people's will distinct from that which is to be consulted in everyday governmental choices.[39] We are dealing with a law made for the legislature by a superior lawmaker—not self-commitment by an entity with a single continuing will. Looked at this way, the charge of self-judgment is still entirely plausible.

Waldron, however, raises another problem with this "self-judgment" argument for judicial review. Even if the legislature is an imperfect interpreter of the rights to be safeguarded, it does not follow that the judges are significantly better:

> unless it is seriously imagined that issues of rights should be decided by an outsider – by a Rousseauian 'lawgiver' perhaps, or by some neo-colonial institution that stands in relation to a given community as (say) the British Privy Council stands in relation to New Zealand – such decisions will inevitably be made by persons whose own rights are affected by the decision. Even a Supreme Court justice gets to have the rights that he determines American citizens to have … Facile invocations of *nemo index in sua causa* are no excuse for forgetting the elementary logic of authority: people disagree and there is need for a final decision and a final decision-procedure.[40]

This argument presumes that courts and legislature would do effectively the same thing in resolving disagreements about rights. If so, *both* institutions will necessarily be engaged in self-judgment, and the choice between them may reasonably turn on their respective c laims to democratic respectability.

This same understanding of the judicial function underlies Waldron's response to the second doubt about legislative authority over human rights ques-

[37] On constitutional rules as pre-commitments, see J. Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality (Cambridge: Cambridge University Press, 1988).
[38] Waldron, n. 14 above, 266; see also p. 298.
[39] G. Wood, The Creation of the American Republic, *1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 318–43; Ackerman, n. 16 above.
[40] Waldron, n. 14 above, 297.

tions, the unpredictability of its decisions. He rejects the premise of the objection. He takes for granted that we will want to change the way we deal with rights issues over time. It follows that "we must leave the members of the society to work out their differences and change their minds in collective decision-making over time the best way they can".[41] If the issue is how best to structure the process for "changing our minds in collective decision-making over time," the attractiveness of the unelected courts as opposed to the elected, and therefore more popularly responsive, legislature is radically diminished.[42]

Both responses depend on a particular view of constitutional adjudication—one quite different from that traditionally associated with constitutionalism. The conventional view, outlined above, postulated the formulation of a set of fixed constitutional rules and the application of those rules to contested acts of the state by a constitutional court. In that process, the problems of self-judgment and unpredictability are largely absent. This has been thought the most promising way to realize the advantages of government by law expressed by Aristotle in the *Politics*: substitution of the government of "God and reason" for the "wild animal" of human appetite and passion that "warps the rule even of the best man." Law is "wisdom without desire."[43] Since this amounts to government by static and, therefore, increasingly mindless rules, it may be seriously criticized as a practical technique of social regulation. But this not the defect emphasized by critics worried about the counter-majoritarian nature of judicial review. That is because, remarkably, they have refused to treat judicial constitutional control as consisting of the application of constitutional rules. It is pictured, instead, as an exercise in political choice.

The counter-majoritarian anxiety, that is, is part and parcel of the American realist critique of adjudication.[44] In his formulation of the problem, Bickel felt he had first to put aside the possibility that the judges might simply apply the rules enacted by the constitution-makers. He described derisively the idea that the "Constitution [could] embody a clear and certain yardstick to measure the actions of the other branches of the government" and invoked the realists for the proposition that legal rules cannot produce determinate results.[45] In particular, he attempted to debunk the idea that what courts did (or were supposed to do) was to consult and apply the meaning of the rules in the constitutional text in the sense that was intended by their creators. He assured readers that the framers themselves knew that "nothing but disaster" could result from attempting to adhere to the "specific intent of the framers of a constitutional provision … [H]istory cannot displace judgment [and] it should not if it could."[46] In the past thirty years there has been a vigorous debate on the propriety of reference to his-

[41] Ibid. 269–70.
[42] Ibid. 306.
[43] Aristotle, Politics, trans. H. Rackham (Cambridge, Mass.: Harvard University Press, 1937), 3. 11.3–5, 265.
[44] K. Ward, The Legacy of the Counter-majoritarian Difficulty; Does Law Have a Place in Contemporary Constitutional Theory?, Paper presented at the Annual Meeting of the American Political Science Association, Washington, DC, 2000 (on file with the author) 7.
[45] Bickel, n. 6 above, 77, 79–80.
[46] Ibid. 106, 108.

torical intentions in constitutional adjudication. It is fair to say, however, that the overwhelming weight of academic opinion has agreed with Bickel that, at least to some significant degree, constitutional courts exercise will as well as judgment.

This vision of judicial decision-making is crucial in understanding criticism of it premised on democratic principles. It assimilates the actions of a court to those of ordinary political actors. Critics are at pains to assert that the courts are not "mere machines," translating the law to particular cases.[47] Rather, like legislatures, they make genuine choices. Constitutions, according to Waldron, "invest a power of decision in [a court] whose job it is to determine *as a matter of judgment* whether conduct" violates the restraints established.[48]

This conception of judicial review seems to have particular force when applied to constitutional rules establishing individual rights. Such provisions, it is contended, are peculiarly resistant to a textual formulation that will minimize the element of judicial choice. In what may be the modern *locus classicus* of American skeptical commentary on judicial enforcement of constitutional rules against the legislature, Learned Hand singled out the individual rights provisions of the Constitution. Insofar as constitutional rules merely divided public power among various agencies, Hand conceded, it was "hard to escape the necessity" of some monitoring tribunal. But, insofar as a constitution goes further and lays down "general principles to insure the just exercise of these powers," things were different:

Here history is only a feeble light, for these rubrics were meant to answer future problems unimagined and unimaginable. Nothing, which by the utmost liberality can be called interpretation, describes the process by which they must be applied. Indeed, if law be a command for specific conduct, *they are not law at all* … The answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh …[49]

The same conclusion persuaded Hans Kelsen to propose a constitution for Austria in 1920 without a statement of personal rights. That constitution was notable for its establishment of a specialized Constitutional Court with the power to hold acts of the legislature unconstitutional—a system that has become the model for modern European constitutional courts. Kelsen believed it would be dangerous to give this court authority to insist that legislation conform to "the ideals of equity, justice, liberty, equality, morality, etc., without in the least defining [precisely] what are meant by these terms." To do so, he thought, would invest a supreme legislative power in the court, effectively creating a government of judges. Such power would stimulate a hostile reaction and subvert the utility of the court in the other areas of its jurisdiction.[50] In fact, the human rights aspects of constitutions have aroused the most intense worries among critics of constitutional limitations on legislatures. Jeffrey Goldsworthy summed up these concerns:

[47] Wood, n. 39 above, 161 (quoting Thomas Jefferson).
[48] Waldron, n. 14 above, 262. Grimm, n. 13 above, 206 (adjudication is a mixture of 'cognitive and voluntary elements').
[49] L. Hand, 'The Contribution of an Independent Judiciary to Civilization', in I. Dillard (ed.), *The Spirit of Liberty*, 3rd edn. (New York: Knopf, 1960), 159, 161–2; my emphasis.
[50] A. Stone-Sweet, Governing with Judges: Constitutional Politics in Europe (New York: Oxford University Press, 2000), 36.

Moreover, those [individual rights] principles must be abstract and flexible, to ensure that government can respond appropriately to all the exigencies of changing circumstances. That is why a judicially-enforceable Bill of Rights consists of abstract and flexible principles of political morality, whose "interpretation" is indistinguishable from moral and political philosophy.[51]

If, in fact, the enforcement of human rights limitations by courts against legislatures is "indistinguishable from moral and political philosophy," if it involves not interpretation but "interpretation", if what it invokes is, as Hand said, "not law at all," the case for an authoritative judicial power over legislation, based on the application of binding rules, collapses. It can no longer claim to be applying pre-existing rules for the state. It is engaging in an enterprise that is, at bottom, indistinguishable from that of the legislature.[52]

This conflation of legislative and judicial functions is at the heart of the criticism of the judicial protection of protection of rights. Noting the fact that collegial constitutional courts frequently divide on questions of constitutionality, Jeremy Waldron infers that courts like the United States Supreme Court use basically the same decision-rule as the one we use in popular referendums and elections. The only difference lies in the number of people affected by the issue who get to vote; just nine as opposed to millions … When people in this community disagree about rights, our rule is not that the right view is to prevail. Our rule is simply that the matter is to be considered and that a bare-majority of five Supreme Court justices over four is to settle the issue.[53]

John Ely summed up this skeptical attitude some time ago: "We like Rawls, you like Nozick. We win, 6–3. Statute invalidated."[54]

It might be worth digressing to note that there is a case, to be made even for constitutional adjudication in which courts exercise legislative judgment, rather than apply pre-existing rules. As a matter of constitutional design that is, we might prefer a system in which there was a check, even a non-rules-based check, on the effectuation of popular will. That is, we might prefer a complex legislator with both democratic and undemocratic elements. In the long history of government, the unchallengeable priority of democratic decision-making is a fairly recent phenomenon. The tempering of democratic representatives with purposefully undemocratic elements has always had an appeal. The idea of "mixed government" was familiar to the ancients. Canvassing the classical forms of democracy, aristocracy, and monarchy, Cicero was sure that all were "surpassed by an even and judicious blend of the three simple forms at their best."[55] At the time of the American founding, the British constitution was generally agreed to be a model of political wisdom and its mixture of democratic and undemocratic institutions was one of the features that attracted the most admiration.[56] The introduction of upper houses in American legislatures was intended by some of its advocates not only

[51] Goldsworthy, n. 26 above, p. 278–9;
[52] Ward, n. 44 above; Stone-Sweet, n. 50 above, 139.
[53] J. Waldron, *Freeman's Defense of Judicial Review*, (1994) 13 Law and Philosophy 27, 32, 36.
[54] Ely, n. 19 above, 58.
[55] Cicero, The Republic and The Laws, trans. N. Rudd (Oxford: Oxford University Press, 1998), 32.
[56] Wood, n. 39 above, 197–206.

to provide representation to a distinct interest in society, but also to provide a judgment "perfectly independent of its electors."[57] Similarly, the executive veto (in which some proposed the judges have a share) evinced a mistrust of unfettered legislative democracy.[58] Bickel's solution to the counter-majoritarian difficulty was not to eliminate judicial review, but to reserve its exercise for those occasions where courts could contribute to the development and application of enduring principles—a function he conceded to be inconsistent with democratic decision-making.[59] It might be contended that such a complex legislator would better protect the activities favored by modern conceptions of rights than one that was chosen in a more thoroughly democratic procedure.

This argument on behalf of mixed government, however, is distinct from the explanation of judicial authority I have outlined in this essay. The latter is entirely dependent on the assumption that courts exist only to vindicate pre-existing rules (and, therefore, rights). Like the idea of a mixed constitution, this model denies the automatic priority of democratic government but it also secures defined spheres of protected conduct against the authority of any institutions —representative or otherwise—to redefine rights on a continuing basis. The arguments against it, however, are unanswerable, even on its own terms, *if the critics' assumptions about the actual operation of constitutional courts as something other than rule-appliers are correct*.

The defense of the practice of constitutional review I have offered assumes courts can and do enforce rules. This assumption is notoriously controversial. If it is wrong, judges will inevitably have to fall back on the same kind of ad hoc decision-making we expect from legislatures but without the satisfactions and safeguards of representative democracy. Can we expect courts to follow rules? The answer, here as elsewhere, of course, is—it depends.[60] No one thinks courts are perfect translators of the rules invoked before them on every occasion. But it is equally clear that rules sometimes do decide cases.[61]

I should make clear what I mean by "following rules". The mere invocation of a legal text in connection with a decision does not, by itself, signal a case of rule-following. For reasons I have elaborated elsewhere, I believe that to follow a rule means to decide in accordance with a judgment made by the maker of the rule at the time of its creation,[62] Rule-application that follows the rule-makers' original design treats the meaning of the rule as fixed. This approach gives a stability to the content of legal rights that is essential to the personal security at the heart of the human rights project. Preference for judicial over legislative interpretation of rights, therefore, seems to hang on the question of whether or not judges are capable of subordinating their own judgment to that incorporated in the rules

[57] Ibid. 213 (quoting Thomas Jefferson).
[58] F. McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (Lawrence: University Press of Kansas, 1985), 242, 254.
[59] Bickel, n. 6 above, 24–7; Waldron, n. 14 above, 264 (agreeing that constitutional review results not in an. aristocracy but in a 'mixed constitution').
[60] Sadurski, n. 1 above (emphasizing the 'fact-sensitive' nature of such inquiries).
[61] Schauer, n. 4 above, 191–6.
[62] Kay, n. 35 above; R. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*. (1988) 82 Northwestern University law Review 226.

by their makers. In this article, I can only mention and respond briefly to some of the arguments that they are not.

I have already noted the claim, in a number of critiques of human rights adjudication, that constitutional provisions of this kind are prone to a particularly unconstrained decision procedure. This is a matter of degree. Article 1 of Protocol 13 of the European Convention of Human Rights and Fundamental Freedoms says: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." This prohibition, moreover, is declared not subject to abridgement even in cases of "public emergency threatening the life of the nation."[63] Such a provision leaves little room for the kind of legislative discretion suggested. At the other extreme, the provisions of the Canadian Charter of Rights and Freedoms are guaranteed by Section One, which declares them to be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[64] This text appears to authorize exactly the weighing and balancing of competing interests and values that is characteristic of legislation. And, in this case, the Supreme Court of Canada appears to have accepted the apparent invitation with enthusiasm.[65] There are certainly intermediate cases.

Even constitutional provisions that, on their face, appear to call for the judges' moral evaluation, moreover, might, upon closer examination, turn out to be more bounded. That is, the constitution-makers may have had certain specific factors in mind before a right could be infringed. The obligation of judges faithfully to apply pre-existing rules entails the obligation to prohibit or prescribe the category of conduct intended by the rule-maker.[66] It is not impossible that constitution-makers intended to leave the actual definition of the relevant categories to judicial decision. (In the case of the Canadian Constitution Act 1982, there is some evidence for this view.[67]) But the mere use of broad language in describing rights is not conclusive on this point. There is nothing built into the very idea of protecting rights through an entrenched constitution that entails such judicial authority. In each case, the question is contingent on the facts of constitution-making.

The arguments against describing judicial review as rule-application, therefore, depend on the character of the particular constitutional text with which judges are entrusted. There is, however, a broader critique, one less vulnerable to counter-argument. That is the psychological claim that human beings vested with the authority to make conclusive interpretations of the highest law, and immunized from accountability for their decisions, will, inevitably, yield to the temptation to venture beyond the rules. It would be disingenuous to pretend that

[63] Convention tor the Protection of Human Rights and Fundamental Freedoms, 3 May 2002, Council of Europe, Protocol 13, Arts 1, 2. The emergency provision from which the protocol is made immune is in Art 15 of the Convention.

[64] Constitution Act, 1982, s 1.

[65] *See, eg.* F. Morton, *The Charter Revolution and the Court Party*, (1992) 30 Osgoode Hall Law Journal 627.

[66] R. Kay, *Original Intentions, Standard Meanings and the Legal Character of the Constitution*, (1989) 6 Constitutional Commentary 39.

[67] P. Hogg,Constitutional Law of Canada,4th edn,(Scarborough, Ont.:Cars well,1997) ss 57.1(f) and (g). I find the same position with respect to the United States Constitution of 1787–9 to be considerably less persuasive. Kay, n. 62 above, 259–84

there is not much force to this assumption and—more tellingly—that there is not much evidence for it. The "great cases" of the United States Supreme Court seem to be dominated by decisions that no reasonable person could justify as mere extrapolations from the Constitution of 1787–9 as amended. Other jurisdictions have experienced much the same phenomenon.[68]

Nevertheless, I maintain that, in general, entrenched constitutional rules (and not just constitutional courts) can and do constrain public conduct and protect human rights. More particularly, I think they do so, at least in part, because courts regularly apply-- and in any event, it is assumed that they apply-- these rules to challenged conduct.[69] The proposition that judges, in general, are incapable of complying with the relevant rules is inconsistent with our everyday knowledge that rules affect human behavior. Stopping at stop signs, recycling our trash, filing our income tax returns are all common manifestations of our compliance with rules. If rule-following in general is not impossible, it ought not to be impossible for judges to follow the rules of a constitution.

This conclusion is not altered by the fact that, unlike most persons subject to rule, a constitutional court of last resort is amenable to neither correction or sanction. As a practical matter, that situation is far from unique. We are all familiar with cases where legal rules are largely effective even though the prospect of external enforcement is pretty much non-existent. That is because people in a society governed by law are socialized to respect the law and, at least in a general way, to believe they have a stake in the success of the legal system. There is no reason to think that judges, even constitutional judges, do not share this inclination. Indeed, there is every reason to think that their training, their professional associations, and the evaluations of their peers will make arriving at the "correct" legal resolution their first objective.[70]

How then can we account for the repeated examples of judicial adventuring that feature so prominently in our constitutional law casebooks? Constitutional courts of last resort necessarily end up with those cases whose resolutions are least clear. Such courts will not be asked whether freedom of expression is violated when the government imprisons dissident newspaper editors. They will be asked instead about the validity of laws prohibiting drive-in theatres from exhibiting movies showing human nudity.[71] Final constitutional adjudication necessarily deals with cases on the outer boundaries of the definitions of rights. The constraints imposed by the constitutional rules, in the circumstances involved in those cases, will be more obscure and, consequently, less confining. To the extent that rule-application is imperfect, those imperfections will appear particularly prominently in these cases.

[68] For example, Morton, n. 65 above. No court presents a better example than the Constitutional Court of Germany. For an examination of the remarkable breadth and imagination of its judgments, see E. Eberle, Dignity and Liberty: Constitutional Visions in Germany and the United States (Westport, Conn.: Praeger, 2001).

[69] I have considered this question at somewhat greater length in Kay, n. 35 above, 39–50; supporting references and citations (such as they are) may be found there.

[70] Compare Goldsworthy, n. 26 above, 271 (judges are especially likely to overstep the rules since "by virtue of their position, symbols of office, and unchallenged authority [they] are constantly exposed to 'the intoxicating notion that they may be wiser, more dispassionate and sure footed than their fellow men'"; quoting Lord McCluskey, Law, Justice and Democracy (London; Sweet & Maxwell, 1987), 154).

[71] *Erznonik v Jacksonville* 422 US 205 (1975).

Even among those cases, human nature and scholarly inclination tend to make us most aware of the ones in which the underlying issues and the contending positions are most controversial. Scholars and critics seek out the complex and novel aspects of any social phenomenon. If hard cases make bad law, these judgments will be especially unreliable examples of the application of constitutional rules. We should no more expect to find ordinary instances of constitutional rule-application in casebooks than we should expect to find healthy people featured in pathology texts.

4 Conclusion

I do not mean that courts, and the possibility of resort to a final court to resolve difficult and disputed constitutional questions, are peripheral features of constitutionalism. They are essential if the system, as a whole, is to be regarded as obligatory. Knowledge that the rules of the constitution may ultimately be vindicated in a process the society regards as impartial and authoritative lends to those rules the normative force that is reserved for binding law. It thus makes it more likely that less controversial observance and enforcement of the rules by political actors will become unreflective practice. Still, the most prominent cases of a constitutional court will almost certainly fall outside that practice and will not represent the whole, or even the greater part, of the effect of legal entrenchment of constitutional rules.[72]

None of this is to deny that much of what constitutional courts do is unsupportable as rule-application, nor that their actions may have a profound effect on the society involved. Whether these effects are regarded as the justifiable costs of a system of constitutional protection of rights, or whether they appear as intolerable intrusions in a democratic government, will depend on both empirical and value judgments. The empirical judgments will turn, on the one hand, on how much we expect the courts to deviate from the rules laid down as limits on the state, and, on the other, on how much we fear an unreviewable legislature will invade the areas of human life we have marked off by our definition of human rights.[73] This is a contingent matter—one that will differ in different places and at different times. The value judgments will depend on our estimate of the benefits we derive from the process of representative self-government. Against those benefits we will have to measure the importance we place on being able to live our lives with the security created by a regime of human rights protected by the rule of law.

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[72] For a valuable discussion of the role of uncontroversial applications of constitutional rules in a legal system, see F. Schauer, *Easy Cases*, (1985) 58 Southern California Law Review 399.
[73] Tushnet, n.27 above, 28–9