

A PHILOSOPHICAL RECONSTRUCTION OF JUDICIAL REVIEW

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I. THE OLD PROBLEM AGAIN

The power of the courts to review the constitutionality of legal norms such as statutes or decrees enacted by the democratic branches is one of the central features of constitutional or liberal democracies. This concept was introduced, under the modality of concrete and corrective control, by Justice Marshall in the 1803 case of *Marbury v. Madison*.¹ Judicial review spread in the same form to many Latin American countries. In Argentina, it was accepted for the first time by the Supreme Court in 1887 in the case *Sojo*.² In Europe, judicial review was introduced after the First World War by a special Constitutional Tribunal, in the Austrian Constitution of 1918 and the Weimar Constitution of 1919.³ And judicial review was reintroduced on the Continent in almost all the post-Second World War constitutions.⁴

Judicial review is the main mechanism protecting individual rights against the political powers that may ignore or undermine those rights. It protects individual rights even when the political powers respond directly or indirectly to popular will. Judicial review of the constitutionality of legislation thus creates a balance between the collective will and interests of the people, and the fundamental rights of each individual.

Notwithstanding its crucial role in defining a constitutional democracy, judicial review's justification is rather mysterious (as attested to by the host of works devoted to the subject). Judges—particularly superior court judges, like the justices of a supreme court or a constitutional tribunal—usually are not directly subject to the democratic process since they are generally not popularly elected but

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¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

² 32 Fallos 125 (1887).

³ Hans Kelsen greatly influenced both of these constitutions. Thus, judicial review was introduced as an abstract and preventative doctrine.

⁴ Examples include the Italian Constitution of 1948, the Bonn Constitution of 1949, the French Constitution of 1958, the Portuguese Constitution of 1976, and the Spanish Constitution of 1978.

appointed by a popularly elected branch of government. Furthermore, in most cases, they are not subject to a periodic accounting, nor do they respond directly to public opinion and discussion.

Superior tribunals resembling the United States Supreme Court and most Latin American supreme courts are chosen by the president, with or without advice and consent of the legislature. The judges generally have life tenure, subject to impeachment for misbehavior. Justices in European-style constitutional tribunals are appointed by political bodies and remain in their position for a definite period. However, European courts' more direct connection with the democratic process still does not make them as accountable to the public as legislative or executive branches of governments. Why should the rather aristocratic judicial branch have the last word on such important questions as the scope of individual rights, the separation of powers or the adequacy of democratic procedures, rather than elected officials who are subject to the permanent control of popular will and opinion? This problem, the *counter-majoritarian difficulty* of judicial review,⁵ has received much more attention from North American scholars in the last decade than from scholars elsewhere in the world. This difficulty calls into question the very principle of division of powers, ascribing to judges the role of applying decisions of the democratic organs, without any corresponding popular accountability.⁶

In this Article I offer a philosophical foundation for judicial review which will determine its limits and scope, answering the counter-majoritarian difficulty in a way that in some ways differs from previous analyses by other scholars. My arguments will go through several steps and exhibit a dialectical structure. First, I shall examine an argument which offers an obvious justification for judicial review. After rejecting that argument, I shall offer a second one that goes even further, grounding the absolute subjection of democratic branches to judicial control. Given the paradoxical nature of the argument, I shall offer a third which questions any possibility of judicial review of democratic decisions. Finally, I shall present three arguments which offer exceptions to this denial of judicial review, advancing toward a theory of the judicial control of democratic decisions which involves both important restraints and significant leeway.

My arguments will employ, when necessary, tools of conceptual

⁵ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁶ See MONTESQUIEU, *THE SPIRIT OF LAWS* (David Wallace Carrithers ed., 1952) (the text of this edition is Thomas Nugent's translation (London, Nourse 1750) of the first French edition (Geneva, Barillot 1748)).

and logical analysis that seem to be out of fashion among constitutional scholars writing in the United States, as I think that they are useful in illuminating some frequent quandaries. The aim of this work could be described as the dismantling of the institutional arrangement of judicial review to reveal its logical and conceptual structure, thus preparing the way for a more robust reconstruction. The partial conclusions of my analysis may appear wildly implausible to lawyers accustomed to relying upon common sense, but if they can contain their impatience with philosophical free-wheeling speculation, they will find the final account much more acceptable to their sensibilities. My focus will not be on any specific constitution, since I wish to unearth problems and to propose solutions which could be of interest to lawyers in any legal system.

II. A BROAD RECOGNITION OF JUDICIAL REVIEW: MARSHALL'S "LOGIC" AND KELSEN'S "PROBLEM"

The clearest ground for judicial review was advanced by John Marshall at its very moment of inception.⁷ Marshall's justification for judicial review exhibits such a pristine clarity and such an overwhelming cogency that one is tempted to speak of Marshall's "logic." It is still surprising to observe the dexterity with which this military man deployed subtle conceptual distinctions (such as the validity of norms and different normative strata) that only much later were elucidated by scholars of considerable philosophical sophistication such as Hans Kelsen.⁸

It is useful to cite for the thousandth time the relevant paragraphs of Marshall's opinion, which are the vehicle of his logic:

It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions

⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸ See HANS KELSEN, *PURE THEORY OF LAW* (1934).

contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the

greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.⁹

The logical structure of Marshall's reasoning may be displayed along the following lines:

PREMISE 1: *The duty of the judiciary is to apply the law.*

PREMISE 2: *When there are two contradictory laws the application of one of them excludes that of the other.*

PREMISE 3: *The constitution is the supreme law and the defining criterion of legality for other norms.*

PREMISE 4: *The supremacy of the constitution implies that when it is in conflict with a norm enacted by the legislature, the latter ceases to be valid law.*

PREMISE 5: *The negation of the foregoing premise would imply that the legislature might modify the constitution through an ordinary law, and thus that the constitution is not operative in limiting that legislature.*

PREMISE 6: *The legislature is limited by the constitution.*

PREMISE 7: *If a law is not valid then it lacks binding force.*

CONCLUSION: *If an enactment of the legislature is contrary to the constitution it is not binding upon the judicial power.*

This reasoning seems to be fully valid. Thus, if the supremacy of the constitution is recognized, judicial review seems to necessarily follow: judges should not apply legislative enactments which are contrary to the constitution. This conclusion would apply to any legal system with a supreme constitution. When judicial review does not exist, as is the case in the British legal system, this logically implies that the system not only lacks a written constitution, as is evident, but that it lacks a constitution at all! The logical necessity of judicial review that follows from *Marbury v. Madison* has rarely been commented on by constitutional scholars, who instead devote their energies to the legitimacy of judicial review. Nevertheless, if Marshall's logic were cogent, these scholars would be wasting their time, since what is logically necessary does not need an evaluative justification, unless that justification addressed the presupposition of the logical necessity, that is, the supremacy of the constitution.

However, I believe that Marshall's logic is not so solid, after all.

⁹ *Marbury*, 5 U.S. at 177-78.

In order to display the flaws in his analysis, I refer to a problem faced by Kelsen when he drew the implications of a conceptual scheme similar to that of Marshall's.¹⁰ This contrast is attractive, since Kelsen paralleled Marshall in his influence on the introduction of judicial review.

Kelsen depicted the structure of a legal system as a pyramid. At the top is the *Grundnorm*, or fundamental norm, which is a presupposition of legal thinking that validates the ultimate positive norms or laws of the system (the positive constitution of a country).¹¹ In turn, the constitution validates the derivative norms (legislative statutes) which are enacted in conformity with the prescriptions concerning the competent official, procedure, and content of the former norms. The derivative norms determine the validity of lower norms enacted in conformity with them (administrative decrees, municipal ordinances, and so forth). Finally, the bottom of the pyramid is formed by individual norms, which refer to particular persons and acts such as administrative orders, judicial decisions, or contracts, enacted in conformity with the prescriptions of controlling superior norms. If a prescription is enacted without following the requirements of competent official, procedure, and content established by valid higher norms, it is not a valid norm of that system.

The recursive criterion of validity that Kelsen offers for the lower norms of the system establishes that a norm is valid when it satisfies the conditions established by a higher valid norm of the legal system. The validity of the ultimate norms of the system is determined by the application to the fundamental norm. A law is valid for Kelsen (according to the characterizations he offers in his successive works) if it "exists as such," has "binding force," and belongs to the legal system.¹²

However, when Kelsen deploys this conceptual structure for the case of conflicts of norms or laws of different hierarchy such as unconstitutional statutes or illegal ordinances, he encounters a substantial difficulty, which I deem "Kelsen's problem." The foregoing conceptual scheme implies that it is enough for a lower norm to contradict a higher norm—either in enactment or in substance—for it to lack validity and thus not belong to the legal system, or as Marshall asserted, for it not to exist as law.¹³

¹⁰ Kelsen, *supra* note 8.

¹¹ *Id.* at 221-78.

¹² See Carlos S. Nino, *La Validez del Derecho* (1985) (discussing the ambiguities and problems of these characterizations of validity).

¹³ *Marbury*, 5 U.S. at 177-78.

Nevertheless, unlike Marshall, Kelsen perceived that this does not respond to the phenomenology of legal thinking. Many statutes or other laws that objectively contradict constitutional clauses are considered by jurists to be valid and binding laws. This occurs in several situations: with regard to the effects of an unconstitutional statute prior to its being declared unconstitutional; in legal systems (like Argentina's) where judicial decisions, even those declaring a statute unconstitutional, have no *erga omnes* effects because they are only applicable to the specific facts of the cases; when courts mistakenly declare constitutional a statute which is obviously not so; in legal systems in which there is no judicial review (like Great Britain's); or when judicial review does exist but it is not used to overturn a particular statute.

These situations are theoretically different. For instance, if there is no procedure for challenging the constitutionality of statutes, the supremacy of the constitution may be in doubt, and when a judge or a superior court mistakenly declares a statute constitutional, an epistemological problem arises about how and by whom constitutionality is to be objectively determined. However, despite their relevant differences, all these situations present the problem that the notion of legal validity and normative hierarchy deployed by Marshall and Kelsen do not coincide with legal thinking. For instance, one could be convinced that a statute that declares homosexual acts among adults punishable, objectively violates the Liberty Clause of the Fourteenth Amendment of the United States Constitution. But it is quite different to believe that the statute has no binding force or that a imprisonment under that statute would be analogous to an illegal kidnapping.¹⁴ Most lawyers would not draw these inferences from the fact that a statute is objectively unconstitutional, regardless of Marshall's and Kelsen's characterizations.

Kelsen resorted to two theoretical devices in order to try to solve his problem. The first was the adoption of the subjectivist approach towards the validity of legal norms, maintaining that the validity of a norm depended upon its being declared so by a judge.¹⁵ This was a highly unfortunate theoretical step. If the validity of a legal norm or law depended not on the objective satisfaction of the conditions established by superior legal norms, but on a *judge's declaration* that it satisfies those requirements, the concept of validity would not be available to the judges themselves to justify their own decision about

¹⁴ This would be especially true since the United States Supreme Court declared just such a statute constitutional in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁵ Kelsen, *supra* note 8, at 73-74.

whether or not to apply a legal norm (this is the same criticism that is usually made of the realist conceptualization of law). As Joseph Raz stated,¹⁶ Kelsen here confused the fact of whether a law is or is not valid (and thus whether the decision of a judge which applies it is correct or not) with the fact that a judge's decision, correct or not, has binding force and constitutes *res judicata*, according to other norms of the system.

The second theoretical device which Kelsen used to try to solve the problem of the discrepancy between the application of his concept of legal validity and the usual conclusions of legal thinking, was the "alternative tacit clause."¹⁷ Kelsen's idea was simply that if ordinary legal thinking considers that, under certain circumstances, a statute is valid and binding despite contradicting an express clause of a valid superior norm, then it must be because legal thinking is assuming that there is a tacit clause in the higher law other than the express clause whose stipulations are violated by the inferior norm. This tacit clause would authorize the enactment of the lower norm despite its contradiction with the explicit text. Hence, higher norms have disjunctive terms: the explicit stipulated conditions for the enactment of lower norms and the tacit authorization to enact norms without complying with the former conditions. Kelsen makes it clear that this does not mean that the conformity with the tacit clause is of the same value as conformity with express clauses. The legal system generally favors the explicit text, establishing sanctions or nullification procedures when the inferior norm or law departs from it. However, a lower norm's conformity with the tacit clause of the higher norm explains why the lower norm might be considered to be valid even when infringing on the explicit formulation of the higher norm.

Unless properly qualified, the Kelsenian device of the alternative tacit clause is truly disconcerting and inadmissible. It seems absurd to suppose that a constitution authorizes the enactment of statutes with any content whatsoever. A constitution gives a certain content priority to some laws over others by establishing mechanisms of sanction and nullification (even if these mechanisms will not be employed). However, it is not easy to perceive the meaning of laws whose total content is so broad as to be vacuous. Moreover, if we take into account the logical interdependence of the requirements of authority, procedure, and content (since an authority operates legitimately when it adheres to its prescribed procedure and when it enacts certain norms and not others), the alternative tacit clause would en-

¹⁶ JOSEPH RAZ, PRACTICAL REASON AND NORMS 129-30 (1975).

¹⁷ KELSEN, *supra* note 8, at 193-276.

compass not only the content, but also the procedure and the authority established by higher norms. Thus, according to Kelsen's proposal, any norm or law enacted, through any procedure and with any content would be a valid norm of any legal system, since its enactment would be authorized by the tacit clause of any norm of competence of that system.

The confusion that Kelsen creates has been partially adumbrated by Eugenio Bulygin, who maintains that there are two meanings of "validity" that Kelsen does not correctly distinguish, and that both these meanings are relevant to norms which contradict the requirements of higher norms.¹⁸ The first meaning of validity concerns *membership* of a norm in a legal system, and the other is the meaning which refers to the *binding force* of the norm in question, in relation to other norms of the legal system. A norm may not belong to the legal system and nevertheless, in certain cases, its application may be obligatory according to norms of that very system. For instance, rules of private international law may declare the laws of a foreign legal system obligatory in certain cases. According to Bulygin, the same is true of unconstitutional statutes; they are invalid in the sense that they do not belong to the legal system, since they do not satisfy the conditions for their enactment established by higher norms of the system.¹⁹ Nevertheless, their observance and application may be obligatory if they are not nullified in the way established by the same system.

However, Kelsen's problem is deeper than Bulygin perceives. Kelsen is not fully aware that his dominant concept of validity is not membership of a norm in a legal system but the "specific existence of norms" or "binding force."²⁰ This implies that a norm is only valid when what it prescribes should be done, that is, when it is permissible to go from describing that some authority has prescribed "x should be done," to the normative proposition that x should be done. Certainly for Kelsen, this shift from the descriptive dimension to the normative one presupposes the existence of the basic norm. This shift suggests that the first legislator's prescription should be obeyed, and allows us to predicate the same with regard to derivative prescriptions. In this way, according to Kelsen, the basic norm allows us to describe legal reality as genuine normative phenomena and not as mere successive prescriptions. The predication that a law is valid, in the sense that it should be observed or that it has binding force, transmits itself to both

¹⁸ Eugenio Bulygin, *Sentencia judicial y creación de derecho*, in LA LEY 1240-307.

¹⁹ *Id.*

²⁰ NINO, *supra* note 12.

authorized legal norms and legal norms, the observance of which is declared obligatory by the law in question, even when their enactment is not authorized. However, according to the generally accepted notion, the predication of *membership* of a norm or law in a legal system requires that the enactment of the norm be authorized by another higher norm in that system. This means that the central concept of validity in Kelsen's theory (binding force) is not coextensive with membership of a norm in a legal system. There are binding norms for a certain legal system that do not belong to that system. However, Kelsen assumes that coextensiveness exists between membership and bindingness, hence the obscurity of his many references to the validity of legal norms. And when he confronts the critical case of an unconstitutional statute—which makes evident that there *are* valid and binding norms that do not belong to a legal system—he strains his theory of coextensiveness by alleging that higher norms tacitly *authorize* the enactment of those binding norms (which would belong to the system).

How is this logical conundrum relevant to the subject of judicial review? Because the resolution of “Kelsen's problem” shows the lack of cogency of “Marshall's logic.” The mere fact that the enactment of a statute does not satisfy the constitutional conditions does not necessarily mean that a statute is not valid in the sense of obligation or binding force (this was perceived by Marshall as a *conceptual* possibility). It may be that legal systems include norms that make it obligatory to observe and to apply, if some conditions obtain or do not obtain, unconstitutional statutes such as the one in question—this may happen with regard to foreign laws, for example. In fact, even legal systems that provide broad procedures of judicial review—like those in the United States or Argentina—nevertheless require courts to apply unconstitutional statutes that have not yet been so declared, either because of mistakes or lack of review by the court.

The thesis is that there are norms in the legal system that under certain circumstances establish the validity or binding force of unconstitutional statutes or illegal administrative ordinances. This thesis supports Kelsen's alternative tacit clause. However, the differences between Kelsen's idea and my thesis follow: First, norms which grant validity to unconstitutional or illegal enactments do not *authorize* such enactments but merely declare that there is an *obligation* to apply and observe the resulting statute. Secondly, these norms are not *necessary* components of every legal system; they are only *positive* and *contingent* parts of some systems, not explicitly enacted but rather generated in a tacit and customary way. These norms may exist in a

system, and if they do, they may have different contents. It is conceivable that a legal system does not make obligatory a law that contradicts the conditions of its enactment. Lastly, norms that require the application of illegal enactments generally discriminate between laws, contrary to Kelsen's thesis. Along with negative conditions such as statutes not declared unconstitutional by a corresponding court, the norms in question must satisfy a certain positive condition. However vague the implicit positive condition is, it is nevertheless real and operative; that is, the norm in question should enjoy a certain color or appearance of legality. This theory has been proposed by Constantineau in his famous doctrine of *de facto* laws,²¹ which describes an extreme case of supposedly valid norms whose enactments have not been authorized. For an unconstitutional statute to be obligatory before it is declared so, the statute must not be *obviously* unconstitutional; it must appear to satisfy the established conditions for enacting norms in the legal system.

The foregoing discussion demonstrates that a norm may not be a "law of the system" (according to conditions established by the constitution) but it still may be obligatory according to tacit contingent clauses of that constitution. Marshall would agree with this assertion in cases where the Supreme Court has wrongly declared an unconstitutional law to be so or where it has yet to declare such a law unconstitutional. Likewise, tacit clauses of the constitution may establish that judges, including the Supreme Court justices, are obliged to apply a law if it is not abrogated either by the authority that enacted it or by a different coequal political body. The former system currently exists in England, Holland, and Finland, and existed in France before the establishment of the Constitutional Council. The latter system exists in most of the rest of present day Europe. Therefore, Marshall's logic breaks down between Premises 4 and 7 of my reconstruction of his argument.²² Premise 4 states that the supremacy of the Constitution implies that a contrary law is not valid (defining valid as membership in a legal system). If "valid" means instead that the application of and obedience to the law is obligatory, then a law that contradicts the Constitution is not necessarily invalid. The denial of the invalidity of a law contradictory to the Constitution does not necessarily imply, as Premise 5 states, that the Constitution does not limit Congress (in the sense that Congress could modify the Constitution by an ordinary law). Congress may be prohibited by the Constitution to enact certain

²¹ See ALBERT CONSTANTINEAU, PUBLIC OFFICERS AND THE DE FACTO DOCTRINE (1866).

²² *Supra* p. 803.

laws but, if such a law is enacted, the application and observance of this law by the courts and the citizenry may be obligatory until Congress itself abrogates this law.²³ Consequently, Congress may be limited by the Constitution, as Premise 6 states, but this limitation does not imply that constitutionality must be judged by courts and that courts are exempt from the obligation to abide by these subsequent enactments. Premise 7 equivocates on the meaning of "validity." If validity means membership in a legal system, which implies the satisfaction of the conditions established for its creation by other norms of the system, the fact that a norm is invalid does not imply that it is also invalid in the sense that its application and observance is not obligatory. Hence, the conclusion of Marshall's reasoning is flawed. A law that contradicts the Constitution could still be applied by the judicial power, depending on what the other norms implicit in the system provide under the circumstances.

Marshall could reply that a constitution that requires judges to apply unconstitutional statutes destroys itself as an immutable instrument for limiting government and converts itself into ordinary law. But this reply confuses a logical problem with a practical one. It is logically possible for a constitution—like the British and former French Constitutions—to prohibit Parliament from enacting certain norms, even when there is no governmental body authorized to abrogate or to nullify the norms enacted in violation of that prohibition.

A contrary conclusion can only be reached by assuming that every obligation implies a sanction or a remedy. However, this assumption is not plausible; even Kelsen admits to a weak concept of obligation that does not presuppose further sanctions as it applies to the obligation of judges to apply sanctions for certain acts.²⁴ The practical efficacy of an obligation to sanction depends upon individual decisions as to how to comply with that obligation. But if the conceptual stipulation that there is no obligation without sanction or remedy is used to solve practical problems, then we create a paradox: an infinite circle of such sanctions or remedies.

Of course, it is possible that the remedy to unconstitutional laws does not have to be effectuated by judicial review. This remedy may be effected by a political body, a popular decision (such as a referendum), or through a mechanism of review so diffuse that each and every citizen would be authorized to disobey an unconstitutional law.

²³ This assumes a concept of legal obligation that does not require sanctions for its enforcement but rather requires the conditions set forth by scholars like H.L.A. Hart. See H.L.A. HART, *THE CONCEPT OF LAW* (1961).

²⁴ KELSEN, *supra* note 8, at 25.

Therefore, a system without judicial review and with a supreme constitution is not a logical impossibility. The main flaw of this argument lies in Premises 4 and 5. The power of judicial review is a contingent arrangement of certain legal systems, which may or may not exist even when the system contains a supreme constitution.

However, it is possible to construct another argument in support of judicial review, with implications even more far-reaching than those of Marshall's logic.

III. AN EVEN BROADER BASIS FOR JUDICIAL REVIEW: THE NATURE OF LEGAL REASONING AND LANGUAGE

The present argument does not depend, like Marshall's logic, on the contingent fact that a constitution is supreme with regard to enactments of the legislature; the present argument applies to any legal system, since it is based on the logical features of legal reasoning and the language of the law. If these arguments are valid, the current preoccupation with the legitimacy of judicial review would be superfluous, since it would follow as a matter of logical necessity. I think the following arguments are valid but I believe that they are neutralized by another valid, but opposing argument which will be explained in the next section. These arguments in combination call for a radical transformation in the current preoccupations of legal scholarship.

I believe the proposition I advocate is so central for the comprehension of legal phenomena that I have deemed it "the fundamental theorem of legal philosophy."²⁵ The proposition asserts that legal norms do not by themselves constitute operative reasons for justifying actions and decisions (like those of judges) unless they are conceived as deriving from moral judgments—normative propositions that exhibit the distinctive traits of autonomy, justificatory finality, universability, generality, supervenience, and publicity.²⁶

The schematic outlines of the quasi-formal demonstration supports my stated proposition. A legal norm or a law may be conceived of as a legal norm,²⁷ as a linguistic act,²⁸ or as a text, in the way that jurists assume that the same norms may have different interpretations. Under none of these three concepts of law may the law itself or its description serve as an operative reason for justifying an action or a decision. The explanation of this is very simple; under these concepts,

²⁵ See NINO, *supra* note 12; for a more succinct account, see CARLOS S. NINO, *THE ETHICS OF HUMAN RIGHTS* 16 (1991).

²⁶ *Id.* at 38-82.

²⁷ See HART, *supra* note 23, at 204-10.

²⁸ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 9 (1971).

legal norms or laws are factual events or entities, and neither facts nor their descriptions allow for a justification of an action or a decision. A normative judgment (the content of the decision or the volition determining the action) cannot be derived from facts or their descriptions. This is no more than an application of the Humean principle about the logical hiatus between what "is" (factual judgments) and what "ought" (value judgments) to be. In simpler form, the facts or entities comprised by the law are compatible with any action or decision which is adopted. There is no pragmatic inconsistency between describing a social practice prohibiting x while deciding that x should be done or directly doing x .

However, Kelsen identifies legal norms not with social practices, speech acts, or texts but with *normative judgments* (propositions which predicate that a conduct ought to be, ought not to be, or may be, done). These propositions constitute the internal aspect of those practices, the locutionary content of those acts, or the meaning of those texts. A normative judgment constitutes by itself an operative reason, as it is valid or true, and it cannot be asserted without a pragmatic inconsistency when the action that the judgment prohibits or condemns is done.

However, if we intend to justify a decision, on the basis of a normative proposition (for instance, "*He who kills another ought to be punished,*" or "*The omission to pay two months of rent gives the owner the right to evict the tenant*") then the question arises as to whether the normative proposition is a *legal norm* or *law*. Kelsen's response might be that we know the proposition is a law because of the proposition's content. A legal norm distinguishes itself from other normative propositions, such as moral or religious ones, because the conduct that the proposition predicates is a coercive act or sanction. The previously mentioned examples satisfy this definition but Kelsen's reply is inadequate. In the first place, there are many norms which are evidently legal, yet do not establish sanctions. Secondly (and this has not been generally perceived), there may be religious or moral norms which permit coercive acts (for example, moral theories and principles that justify punishment).

The alternative to distinguishing legal norms from other normative propositions on the basis of content is distinguishing on the basis of *origin*. In effect, it is plausible to maintain that a normative judgment is a law because of its enactment by a certain authority or its establishment by certain social practice. In both cases, it is relevant that the authority controls, and the social practice regulates, the quasi-monopoly of coercion. However, once this premise is accepted,

a difficulty immediately arises; if a legal norm is a normative judgment that we accept because of its enactment by a certain authority or its establishment by a certain social practice, then the *legal norm cannot be an operative reason for justifying a decision*. This is so because the law in question could only operate as a premise of practical reasoning if it is accepted together with a more basic premise: Laws or legal norms are derived from the social practice or the prescription which establishes that law. Once we perceive this, we are in the same situation as the descriptive notions of a legal norm or a law, since it is impossible to derive from a premise that describes a practice or a prescription establishing a law, the normative judgment constituting that law which allows us to justify an action or a decision. When a judgment like "He who kills another ought to be punished" is conceived as a legal normative judgment because it is derived from the premise "Legislator *L* has prescribed 'He who kills another ought to be punished,'" a further implicit premise is presupposed which allows that derivation, the premise that "*Legislator L ought to be obeyed*" (or "*Legislator L is a legitimate authority*," or "*Legislator L has power to enact valid laws*").

However, when the conclusion that legal reasoning is justified only because it is based on a major premise like "*Legislator L ought to be obeyed*," one should ask what sort of proposition is contained within that premise. The story must be repeated again; whether it is a legal norm or a law does not depend on its content but on its origin, but to have the distinctive origin of legal norms one must accept a pair of premises: "*Legislator R has prescribed that legislator L ought to be obeyed*" and "*Legislator R ought to be obeyed*." The same question may be asked of the last proposition but this kind of question cannot be raised indefinitely. A moment arrives when it is necessary to accept the proposition that an authority or social practice ought to be obeyed not because of the origin of the formulation of that proposition, but because of its intrinsic merits. But a normative judgment which is not accepted for reasons of authority but for reasons of the validity of its content is precisely a moral judgment. This kind of acceptance of a normative proposition exhibits the feature of *autonomy* that Kant²⁹ has held to be distinctive of the adoption of moral norms. This implies that a legal norm or law only justifies the practical reasoning of judges and other social actors insofar as it is accepted by virtue of a moral judgment that grants legitimacy to certain authority and a descriptive judgment of the prescriptions of that author-

²⁹ IMMANUEL KANT, *FUNDAMENTACIÓN DE LA METAFÍSICA DE LAS COSTUMBRES* 89 (M. Garcia Morente trans., 1977).

ity. This conclusion constitutes the fundamental theorem of legal theory. (Kelsen also maintains that the force or validity of a legal norm is grounded in a preexisting basic norm that has not been enacted by any authority.³⁰ However, Kelsen neutralizes the moral character of the acceptance of the basic norm by arguing that in legal reasoning that norm is only *presupposed* and not genuinely accepted. But this can only be applied to the reasoning of legal theorists or scholars who need not justify any real decision or action. If judges and other social actors merely hypothetically adopted the basic norm the conclusions extracted from it would be also hypothetical and thus would not justify an action or decision.)

This theorem implies that legal discourse is not an autonomous species but rather a special modality of moral discourse, what Robert Alexius calls the *Besonderesfall* thesis.³¹ In fact, this theorem is easily demonstrated by example: in Argentina there is a debate about whether the Constitution or international covenants should prevail when the two conflict. Advocates of the former view cite article twenty-seven of the Constitution, which states that international agreements should conform to the principles of public law contained in the Constitution.³² At the same time, advocates of the latter view rely on the Vienna Convention of 1969, which establishes that states cannot justify noncompliance with a treaty because it contradicts the laws of the municipal legal system. Curiously, these two positions are completely circular. The supporters of the supremacy of the Constitution base their position in the Constitution while the supporters of the priority of international conventions ground their position in an international convention! This demonstrates the obvious truth that the validity of a certain legal system cannot be merely grounded in rules of that legal system, but must be derived from external principles. This conclusion is perhaps what supporters of natural law have wanted to stress throughout the history of legal philosophy, but they have been so clumsy in their presentation that their thesis appeared to suggest that there cannot be a descriptive concept of law, even for the purposes of *explaining* a legal system, without attempting to use it for *justifying* decisions.³³

The implications of this theorem for the discussion of judicial review are as follows: a judge cannot justify any decision on the basis of a legal norm, such as a congressional statute, if he does not ground

³⁰ Kelsen, *supra* note 8, at 193-221.

³¹ Robert Alexius, *A Theory of Legal Argumentation* (1989).

³² *Constitución Argentina* art. 27.

³³ See Carlos S. Nino, *Dworkin and Legal Positivism*, 89 *MIND* 519 (1980).

the legitimacy of that norm, either explicitly or implicitly, upon some *moral* principles (in a broad sense of the expression). These moral principles establish the conditions of authority, procedure, and content which ground the duty to obey and apply a certain law.

If the constitution is conceived of as the expression of those moral principles which grant legitimacy to the laws or legal norms of lower hierarchy, rather than as a social practice or a document resulting from such practice under a descriptive concept, then under a normative concept we must conclude that *judges cannot but review the constitutionality of legal norms*. This does not depend on the type of legal system or constitution but is merely a question of logic.³⁴ A judge can not justify a statute enacted by the legislature by relying on that statute if she does not assume, explicitly or implicitly, judgments on the moral legitimacy of the authority of the legislature and on the fact that the fundamental rights which condition that authority have not been violated by the enactment.

Although this theorem is a sufficient justification for judicial review of an extremely wide scope, there is an alternative parallel argument that is based on the nature of *the language of law*.

I oversimplified my argument by stating that a normative judgment of "He who kills another ought to be punished" must derive in the first place from a descriptive judgment "*Legislator L prescribes 'He who kills another ought to be punished.'*" But, in addition to these two judgments, there are intermediate premises that must be intercalated to obviate the need for the quotation marks surrounding Legislator *L*'s proposition. This allows the proposition to be employed directly in the derivative premise. These additional premises allow us to interpret the text and decide which conducts are covered by them.

The interpretation of text involves a series of successive steps, several of which implicitly resort to premises of evaluative character. The first step establishes the general criterion for understanding the legal material that justifies a decision. For instance, one must decide whether meaning must be derived from the creator's intent, common linguistic usages, or combination of these two. This step requires some evaluative hypothesis regarding the function of legislation and the judiciary's position on such legislation. The second step empirically verifies the factual data from the first step as it relates to the

³⁴ The necessary structure of justificatory practical reasoning can only rely on norms enacted by certain authorities if the legitimacy of that authority has been previously grounded in certain basic principles—like the constitutional ones—which are accepted because of their intrinsic validity and not because they originate in some other authority.

intention of the legislator or to the linguistic conventions of the community. The third step involves choosing between an ambiguous text and the limitation of vague propositions, then attempting to resolve semantic vagueness and syntactic ambiguities by applying the criterion adopted in the first step. The fourth step extracts the relevant logical consequences from the norms which have been identified through the previous steps. Finally, in order to surmount the newly revealed logical interdeterminacies—like lacunae, contradictions, and redundancies—one must resort to evaluative hypotheses. The evaluative character considerations of interpretive process that must be resorted to in steps one, three, and partially in steps four and five, cannot be replaced by legal norms or laws. If such replacement is attempted—as may be convenient—the difficulty of interpreting the interpretive legal norms will remain. The process of interpretation always resorts to moral judgments in a broad sense, since they must be accepted because of their intrinsic merits and not because of their establishment by a certain authority.

If we view the constitution normatively, as a set of valid principles delineating the functions, goals, and limits of basic authorities and social practices, we may conclude that the review of the constitutionality of statutes and other laws is unavoidable in the process of interpreting the legal materials that other moral principles indicate are relevant. To move from a premise that describes a relevant practice or an authoritative prescription to the normative proposition justifying her decision, a judge applying a law cannot avoid taking into account evaluative considerations (which are part of the constitution when it is normatively conceived). Considerations such as legislative goals, the disparate intentions of lawmakers, popular reactions and contextual circumstances, are all evaluative or moral in character.

Therefore, there are two parallel reasons for grounding the broadest possible judicial review of constitutionality: one is related to the structure of justificatory practical reasoning, while the other is related to the nature of legal language. If the constitution is conceived as generating justificatory reasons, and thus is not viewed in descriptive terms like a text or a practice, then it must be viewed as a set of valid principles. These principles may or may not coincide with what the text or the practice in force establishes about the legitimacy of certain state authorities, their functions and goals, their limits in relation to the fundamental rights of individuals, the balance between the values of justice and security and certainty, and the proper division between several expressions of popular sovereignty. Under this normative concept of constitution, judges inescapably resort to consti-

tutional principles when they decide how to apply and interpret a certain law. If the interpretation of a law is not justified by those principles, then the law does not constitute an operative reason for adopting a certain decision.

This justification for judicial review has been accomplished by replacing the descriptive concept of a constitution with a normative concept of *a moral or an ideal constitution*.³⁵

It may appear that this conceptual twist changes the whole nature of judicial review so radically that we are no longer justifying the same institution; I shall subsequently take steps to soothe this discomfort, but for the moment, allow that this approach to the constitution does not seem at first sight to be so phenomenologically strange. Despite references to the four corners of the document and the will of the founding fathers, most judges treat the constitution as a set of valid principles and procedures *per se* regardless of the grounds for that validity. As legal realists have always emphasized, judges seldom feel obliged to apply a constitutional clause of which they truly disapprove. In most cases, the radical uncertainties referred to by legal language analysis, potentiated by such broadly phrased documents as constitutions, allow judges to resort to the principles and procedures they deem valid, while avoiding the more complicated and disputable moral justification by dressing these principles in authoritative garments.

The previous argument is a two-edged sword. A positive or historical constitution cannot serve as the operative reason for reviewing other laws. The decision to apply or to reject a certain law can only be justified on the basis of operative reasons constituted by valid, autonomously accepted, moral principles. Thus, identifying the constitution with such principles under a normative rather than descriptive concept, we reach the conclusion that the broadest judicial review of the constitutionality of laws is not only possible, but necessary.

However, the unrestricted breadth that this combination of arguments ascribes to judicial review casts doubt upon its plausibility. Given the dominant role that these arguments grant to evaluative considerations, which determine the acceptance and interpretation of laws, it is possible to doubt the relevance of laws themselves in the justificatory practical reasoning of judges and other social actors.

The first argument that we have examined leads us to the para-

³⁵ A descriptive concept of a constitution refers to either a positive social practice, the speech acts which generate it, or the document that is the result of it, while a moral constitution is a set of valid evaluative principles and procedures enshrined in a document that may or may not coincide with those prescribed by that practice.

dox I have deemed elsewhere the "irrelevance of the government and its laws."³⁶ If legal norm or law must be derived from valid moral principles to justify an action or decision, why not to look for the justification of such action and decision in those moral principles? Do we need a government and its laws? This is the kind of reasoning, grounded in the necessary autonomy of justificatory reasons, that has led authors like Robert Paul Wolff to defend philosophical anarchism—the position that no government or other source of heteronomous reasons is justified.³⁷ If the government acts in a morally correct way and enacts the laws required by the moral principles which justify them, those laws are superfluous. If the government acts contrary to moral principles because of malice or mistake, its laws should not be taken into account. The only laws that might have some significance are those that solve coordination problems between morally indifferent or equivalent situations, because any solution will be justified as long as one is achieved: for example, traffic laws which establish the direction of circulation.

This paradox may be resolved with a twofold answer. First, laws often fill gaps that are not covered by moral principles. As Thomas Aquinas maintained, positive law is related to natural law—my moral principles—not only by specification but by derivation as well.³⁸ Second, the moral justification for laws generally does not include substantive questions, but rather, *procedural* questions. Since the relevant moral principles generally limit themselves to determining the conditions for the selection of political authority and the procedure under which it must act, the satisfaction of these procedural questions allows us to justify the resulting norms. However, it is not easy to see how the gaps of moral principles can be filled without resorting to other moral principles and to detect moral principles which take certain procedures as *ultimately* relevant. For instance, most of the theories justifying democracy are of a procedural character only in the first instance. The relevant procedures are then justified in light of some substantive right such as autonomy or utility, the materialization of which could in principle be determined independently of the procedure in question. However, since legal norms generally affect important moral values, any procedural moral justification of such norms would have to enjoy great weight in order to justify deviations from the maximum satisfaction of those values.

³⁶ CARLOS S. NINO, *ÉTICA Y DERECHOS HUMANOS* (1989); see also CARLOS S. NINO, *THE COMPLEX CONSTITUTION* (forthcoming 1993).

³⁷ See ROBERT PAUL WOLF, *IN DEFENSE OF ANARCHY* (1970).

³⁸ ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Question 90, Article 3, in *BASIC WRITINGS OF SAINT THOMAS AQUINAS* 745 (Anton C. Pegis ed., 1945).

The second argument regarding the interpretation of legal language also questions the relevance of the government and its laws. If we abstract the valuative steps of the process of interpretation that we have analyzed so far, it appears that the only "hard datum" that conditions the process of interpretation—even this is determined by the moral considerations—consists of texts or conducts, that is, a series of graphs or of bodily movements. Given the general criteria for ascribing meaning to such entities or events, the alternatives for cleaning up the imprecisions and ambiguities of those meanings, and the variants for overcoming logical uncertainties, it is clear that the texts and conducts in question may be associated with any propositional content according to the valuative principles that are assumed in each one of the corresponding steps. Hart replies to those who are skeptical about rules (like legal realists) that the fact that there are "cases of penumbra" does not preclude areas of full clarity in the application of the norms.³⁹ However, that does not take into account that the distinction between areas of penumbra and clarity presupposes a choice between diverse criteria of interpretation, and this cannot be accomplished without engaging in extralegal considerations.

These two arguments demonstrate that judges enjoy extremely broad power to decide the constitutionality of laws in light of valuative basic standards that could be conceived of as part of an ideal constitution.⁴⁰ However, these arguments justify an extraordinary scope of judicial review. They lead to extreme legal nihilism, which makes the conclusion of critical legal scholars look pale in comparison. These arguments are so powerful that they have a boomerang effect on the rationale for judicial review; the legal power of *judges* over the citizenry is put in question when the basis for that power (laws and their interpretation) depends on evaluative premises which might be different than the premises adopted by those judges.

In what follows, I shall analyze an argument that questions some presuppositions of the previous ones and which has, thus, an opposite impact upon the justification of judicial review.

IV. A RADICAL IMPUGNATION OF JUDICIAL REVIEW: DEMOCRACY AND ITS EPISTEMIC RELIABILITY

The nucleus of the argument in favor of legal nihilism is as follows: If by force of logic, one needs to resort to moral principles for laws that justify actions and decisions, those laws are irrelevant since

³⁹ HART, *supra* note 23, at 103-07.

⁴⁰ This refers to a normative constitution, which is based upon inherently valid principles and procedures rather than a written text.

those moral principles may themselves justify an action or decision in the case at stake. This argument assumes a position that is not nihilistic toward *moral principles* themselves. If moral principles were only a mask for tastes, interests, or psychological inclinations, then it would not be possible to justify an action or decision. But if this extreme moral skepticism were accepted, the endeavor to justify judicial review (which does more than merely describe positive regulations) would not make sense. Nor would it be possible to explain how a law may justify actions and decisions.

However, the previous argument for legal nihilism contains a more questionable assumption. Any person, including a judge, may have independent access to the *knowledge* of evaluative principles which allows us to justify an action or decision. In other words, this argument presupposes an *epistemic individualism* in the moral sphere. This position, which has its roots in Plato, is assumed by many contemporary philosophers. I believe that John Rawls tacitly adopts the assumption that by mere individual reflection and "reflective equilibrium" an individual can gain access to the knowledge of valid principles of social morality.⁴¹

Some philosophers adopt opposite stances, in the tradition of the Sophists, and perhaps continued by Rousseau and by Republican movements.⁴² Jürgen Habermas, following ideas of Karl-Otto Apel,⁴³ maintains that only through communicative interaction is it possible to have access to the knowledge of valid moral standards and overcome the conditioning and the false consciousness that individuals are subject to as a result of their insertion in productive relationships. This position of *epistemic collectivism*, which sometimes gets confused with an ontological thesis about the truth of moral standards rather than about knowledge, presupposes that the collective practice of discussion or communication is what *exclusively* provides access to intersubjective valid moral principles.

Neither of these two positions is satisfactory. The first leads to the paradox of the moral irrelevance of government and, hence, either to anarchy or tyranny, depending on the balance of powers between those who reach diverse moral conclusions. For example, if I were

⁴¹ JOHN RAWLS, A THEORY OF JUSTICE (1971). I develop this argument in CARLOS S. NINO, EL CONSTRUCTIVISMO ÉTICO (1989). Of course, I am not referring to the later work of Rawls which proclaims an "epistemic abstinency" about moral issues.

⁴² With regard to Republicanism, see Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

⁴³ JÜRGEN HABERMAS, *Ética del discurso: Notas sobre un programa de fundamentación*, in CONCIENCIA MORAL Y ACCIÓN COMUNICATIVA (1985); KARL-OTTO APEL, THE TRANSFORMATION OF PHILOSOPHY (Glyn Adey & David Frisby trans., 1980).

stronger than the rest of my community I would establish a tyranny, not because I believe that *my* government is morally relevant, but because I believe that my moral judgments are valid while opposite ones are not. Epistemic individualism also faces the problem of characterizing the validity of social morality principles. If it depends on the hypothetical acceptability of such principles under conditions of impartiality, rationality, and knowledge of the relevant facts (according to the presuppositions of our practice of moral discussion), then it is extremely improbable that individual reflection can lead to valid standards of intersubjective morality. An individual cannot impartially represent the interests of all individuals who are affected, and cannot overcome the deficiencies in information and reasoning in isolation. It is plausible to maintain that, in general, an individual best understands her own self-interest when the interests are not only based on her desires but also on her decisions about the relative weight of those interests.

Epistemic collectivism raises a different objection. Communicative interaction consists of both expressing the *interests* of the individual participants and, more fundamentally, of formulating propositions about what the *principles* are that impartially contemplate those interests. These propositions should be accepted after discussion in which the participants successfully reach an agreement. When these principles are introduced they are not random proposals, but rather, they are asserted as true or valid, and the discussion is an attempt to demonstrate the principles' acceptance under impartial conditions and if their acceptability leaves aside relevant interests. This process requires a characterization of the validity of intersubjective moral standards, which must be independent of the *results* of the discussion. Otherwise, it would be meaningless to allege the validity of the principles proposed *during* the discussion itself, when a consensus has not yet been reached. Additionally, the process presupposes that the participants have some *title* that demonstrates their access to the knowledge of whether the requirements for moral validity have been satisfied. Without such a title, the participants' interventions in the debate would only be presumptuous chatter without meaning, not respectable opinions which might indeed be right and obtain general support. A participant's reputation of impartiality, rationality, and knowledge of the facts increases the weight of her opinions given her greater access to moral truth. Even when the discussion ends in agreement, a dissenter may request that the discussion be reopened to prove herself to be right. Therefore, epistemic collectivism cannot ex-

plain the nature of the *input* that feeds the discussion or forces its reopening.

Given the deficiencies of both epistemic individualism and collectivism, I subscribe to the intermediate position of *epistemic constructivism*.⁴⁴ This thesis maintains that the process of collective discussion and decision among all parties concerned in a conflict has considerably greater reliability in accessing valid principles of intersubjective morality than individual reflection, for the reasons set forth against epistemic individualism in the preceding text. Unlike epistemic collectivism, this thesis does not maintain that the process of collective discussion and decision is the *exclusive* means of moral knowledge and it does not completely discount the possibility that the requirements of impartiality, rationality, and knowledge may be satisfied through individual reflection. Epistemic constructivism emphasizes, however, that it is unlikely that individual reflection will obtain correct solutions, since without the participation of the people concerned, their real, subjective interests and the weight they should be given would be distorted. The ascription of diverse degrees of reliability to the method of collective discussion and decision, and to individual reflection, has important implications. The conclusion that the former is epistemically superior to the latter leads us to observe its results even in those individual cases in which we are sure that our individual reflection is correct and the collective result is wrong. Otherwise, individual reflection would prevail in every case and the method of collective discussion, that by hypothesis is in general more reliable, would wither away. Even when this second order epistemic reason can justify *observing* the collective outcome, our individual reflection provides a reason for asking for the reopening of a discussion to present our arguments in an attempt to change the decision.

The greatest difficulty in applying these considerations to the political system is that even though the democratic procedures of electing authorities and solving substantive issues closely resembles the informal process of collective deliberation and consensual decision, it nevertheless contains crucial differences. Most importantly, an informal discussion, such as an everyday discussion to resolve a conflict, is only over when we arrive at a *unanimous* agreement. Democracy, on the other hand, operates by simple majority rule. This simple majority replaces unanimity when discussion must be concluded, or when the result of the discussion would implicitly benefit those who favor maintaining the status quo when the time for change is at hand. This also applies to qualified majorities. The passage from

⁴⁴ NINO, *supra* note 12, at 245.

unanimity to simple majority implies a qualitative jump; a unanimous consensus is the functional equivalent of impartiality (because the unanimous consensus implies that the relevant interests have been attended to under the presupposition that each one is the best judge of her own interests), while a majority may discriminate against the interests of a minority.

However, when we compare the latter risks with those involved in other procedures of collective decision making, dictatorship, or elitism, the procedure of collective discussion and majoritarian decision presents various features that generate a greater tendency towards the adoption of impartial solutions than those other procedures.⁴⁵ In the first place, all concerned participate in the debate, with the possibility of expounding their interests. Second, after letting their interests be known, the participants must *justify* their proposals to each other, which implies that they must show that those proposals derive from universal principles that would be accepted by an impartial, rational, and knowledgeable person, considerably constraining the proposals that may be plausibly presented. Third, the need to encourage the support of the majority of other participants—given the uncertain outcome created by the possibility of majoritarian voting—leads to the contemplation of as many interests as possible. Fourth, formal structure at the collective level projects the tendency towards impartiality that the democratic process generates at the individual level. For instance, Condorcet's theorem implies that when individuals are likely to arrive at correct solutions, then as more individuals support a solution, the more likely it is that the solution is correct.⁴⁶

Thus, despite the risk of partiality against minorities, the democratic process probably leads to more correct intersubjective moral solutions than any of the alternative methods of collective decision making. Even experts and moral philosophers cannot match the judgment of the people concerned in appraising the proper weight of their own interests. Many dictatorships, such as those that were frequent in Latin America, did not always lack expertise or good intentions. However, the leaders were completely blind to the interests of people with whom they did not need to interact. This account of the value that is predicated *in general* on the democratic method justifies that its results be observed in each particular case. As individual reflection corrects its mistakes less reliably than the democratic method,

⁴⁵ *Id.* at 248.

⁴⁶ This is demonstrated by Condorcet's famous theorem. JEANE-ANTOINE NICOLAS DE CARITAT, MARQUIS DE CONDORCET, *ESSAI SUR L'APPLICATION DE L'ANALYSE À LA PROBABILITÉ DES DECISIONS PENDUES À LA PLURALITÉ DES VOIX* 1785 (1985).

it is not legitimate to resort to the former for discarding the results of the latter in the cases where we are sure that the collective decision is wrong. To do so would undermine the efficacy of the democratic method of conflict resolution, thereby frustrating the conclusion that it is the most reliable method to reach correct solutions.

Certainly, the epistemic capacity of the democratic process would be greater or lesser depending on how close it comes to the strictures of the original process of moral discussion which determine its inherent tendency towards impartiality. These strictures include participation in the deliberation and in the decision of all those concerned; freedom to present all points of view and a relative equality of the participants; concentration on the justification of proposals that tend to offer different ways of balancing the interests at stake on the basis of principles which are impartially acceptable, regardless of other traits like their being prescribed by some convention or authority; and achievement of the widest consensus possible. Naturally, this implies a program of institutional reforms in order to maximize the epistemic value of democracy.⁴⁷

This justification of democracy allows us to overcome the paradox of the moral irrelevance of government and its laws. Even when only moral principles and not legal norms (conceived of as prescriptions or social practices) provide reasons for actions, if the legal norms have a democratic origin then they provide reasons to *believe* that there are reasons to act. Given this, it is morally justified to act according to norms that have been enacted by the collective procedure of discussion and decision, despite the fact that our individual reflection might indicate to us the existence of opposite reasons.

This vision of democracy serves also to confront the second skeptical argument with regard to law, that of interpretive indeterminacies. If we ascribe epistemic value to democratic discussion and consensus, that value lies not in a text or a social practice but in the propositional content that has been the object of the discussion and the consensus. Thus, not the text or practice in itself, but the intentions of those who proposed the norms and their propositional attitudes are relevant for determining the *meaning* of a text or a practice. The consensus formed out of those intentions enjoys the presumption of validity granted by the democratic process.⁴⁸

⁴⁷ See CARLOS S. NINO, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL* (1992), in which I suggest such a program.

⁴⁸ Of course, a problem arises regarding the passage of time and the resultant weakening of the epistemic value of the consensus on some normative proposition, given the fact that the interests involved change as circumstances and their bearers change. This might be tackled

One could object to the conclusion of the present argument on the basis that it ignores the existence of *individual rights*, the main function of which is precisely to contain majoritarian decisions in order to protect the interests of isolated individuals and minorities. The idea of a liberal democracy is based on the premise that certain rights cannot be trespassed even by majoritarian decisions. These individual rights should be protected by mechanisms such as judicial review, which lie outside the very democratic political process. This seems to be part of Ronald Dworkin's argument, which is based on the distinction between policies and principles.⁴⁹ For Dworkin, policies define collective objectives (such as national defense or a clean environment) which are goods valued aggregatively and not individually. Principles establish rights which protect situations and whose value takes into account the distribution and the individualization of the goods involved. They constitute a barrier or limit against the pursuit of a collective objective, so that a reason based on that objective cannot override a reason based on a right. According to Dworkin, the rationale for the idea that certain decisions are to be made through the democratic process is basically related to policies, since that rationale refers to the need to balance diverse interests and to the inconvenience of retroactive determinations.⁵⁰ On the other hand, this does not apply to decisions made on the basis of principles that do not require a balance of interests and have an atemporal validity. Judges, according to Dworkin, should fundamentally decide on the basis of principles that establish rights and not on the basis of policies.

However, I think that the vision of rights as limiting democracy, either conceptually or evaluatively, is not plausible. From the conceptual point of view, rights constitute a protection of individual *interests* that set forth barriers against considerations grounded on the interests of others or of the social whole. If I have a right to *x*, this right by definition cannot be displaced by the mere consideration that the interests of the majority would be promoted if I were deprived of *x*. But from this we cannot infer that rights are barriers against majoritarian *decisions*. There is no logical inconsistency in stating that the only authority competent to recognize and enforce rights is that of majoritarian origin. Of course, someone might maintain that majoritarian decisions tend to benefit majoritarian interests. How-

through the idea of a changing tacit consensus, which certainly would have an impact on the interpretive question.

⁴⁹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 4 (1977).

⁵⁰ *Id.* at 97.

ever, this is a factual and a moral question and is not imposed by the logic of the concept of rights.

Dworkin's thesis must be appraised in this moral and factual context and not as a conceptual conclusion. However, it should be noted that Dworkin seems to assume that there is ample space for the operation of policies that establish collective objectives without colliding with rights, a space which is occupied by the political process exempted from judicial control. This can well be questioned if one supports a *robust* theory of rights, according to which those rights can be violated not only by positive acts but also by omissions.⁵¹ In this case, rights occupy almost all the moral space, leaving very little room for policies and thus, according to Dworkin's thesis, for the unrestrained operation of the majority. This combines with the present view of democracy, which conceives of democracy as dealing with intersubjective moral issues and not merely as a process of aggregating interests as the opposite pluralist vision holds.⁵²

It is possible to answer pragmatically the objection that majorities can be, and often are, tempted to suppress individual or minority rights. There is no guarantee that another minority or isolated individuals are not similarly tempted, unless their interests coincide with the minority whose rights are at stake. Judges are those isolated individuals. In most democratic systems judges are not appointed through a process of collective discussion and majoritarian decision, nor are their actions the subject of collective discussion (especially life-tenured judges). Therefore, a judge's decision does not enjoy the epistemic value that accrues to the collective discussion process. The discussion inherent in the judicial process limits itself to those directly affected by the conflict at trial. Those who may be affected by the general principles employed to solve that conflict do not participate. Additionally, the conflict is solved by a third person alien to it. This disassociation may be a considerable advantage in terms of impartiality when the conflict encompasses only few people, but when the decision affects interests of a multitude of individuals (as those resolved by judges generally do) whose experiences cannot be represented by an isolated individual, this disassociation is not possible.

Thus, we confront again the famous counter-majoritarian difficulty: What guarantee is there that judges who have not been directly elected through the democratic process, whose indirect democratic origin of authority dilutes with time, and who are not obliged to involve themselves in collective deliberation, are in a better epistemic

⁵¹ See NINO, *supra* note 12, at 199.

⁵² See NINO, *supra* note 25, at 243.

position than democratically accountable legislators to decide according to impartial principles, even when those principles establish rights against the majority interests?

This difficulty cannot be overcome by relying on the democratic origin of the constitution itself, the principles of which are used to exert judicial review. There are several reasons for rejecting this alternative. In the first place, most stable contemporary constitutions have been enacted by exceedingly undemocratic procedures, at least compared to the democratic procedure for adopting statutes and other legal enactments which are sometimes disqualified in the light of the constitution. Second, even when the foregoing point does not apply, as is the case with the Spanish Constitution, the very stability of a constitution requires that the democratic consensus obtained at the time of its enactment becomes progressively more irrelevant with the passing of time, since decades or even centuries later that consensus no longer correlates with the interests of the present majority. This objection may be answered by resorting to the idea of a tacit present consensus, but the very fact that a stable constitution cannot be modified by simple majorities produces a majoritarian consensus against some constitutional clauses. Lastly, this rigidity of the constitution might be justified as an attempt of the majority to protect itself in a paternalistic way.⁵³

Using the democratic legitimacy of current constitutional norms to justify employing them in judicial review in order to disqualify laws of democratic origin applies also to the *dualist* conception of Bruce Ackerman.⁵⁴ He maintains that there are two levels of political action: the constitutional level, the rare moments of extended popular debate and political mobilization and the consequent democratic legitimacy given by the ample consensus reached in those moments;⁵⁵ and the day-to-day political level, in which most citizens do not participate and which thus enjoys a lower level of legitimacy. The results of the latter should be subject to the constraints established by the former. It is the role of judges to ensure that constitutional politics prevail over day-to-day politics. Ackerman presents a theory in which

⁵³ This assumes that the majority that established the original constitution—assuming it was a majority—was in a better condition to impartially decide conflicts affecting the interests of future generations than they would be themselves. This paternalism accurately describes many colonialist justifications. See Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1989).

⁵⁴ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE* 72 (1991).

⁵⁵ This type of political mobilization occurred in the United States with the enactment of the Constitution, during post-Civil War Reconstruction, and when the New Deal was proposed by Franklin Delano Roosevelt. *Id.* at 72-84.

constitutional rights emanate from the democratic decisions of constitutional moments and restrain the expressions of normal politics. This theory opposes both a monist view, in which rights depend on a continuous and permanent democratic process, and a fundamentalist conception, in which rights restrain any democratic decision.

Despite the attractiveness of Ackerman's theory, there are reasons to doubt both the greater legitimacy of the norms enacted in the constitutional moments and the idea that judges should be the custodians of that supposed greater legitimacy. In the first place, it is not clear why dualism, or two political tracks, is more accurate than a *continuum* of several degrees of legitimacy determined by the degree of mobilization and debate. Certain issues, such as abortion or discrimination, provoke ample debate and popular protest and have considerable impact on the legal system, even though perhaps not comparable to the constitutional moments Ackerman points out.⁵⁶ This distinction can be made in relation to a monist system like Great Britain's where there are different levels of democratic expression, including plebiscites, parliamentary elections, the working of Parliament itself, and local elections. Second, the democratic legitimacy of some of the constitutional moments to which Ackerman refers is highly dubious. The deficiencies in the democratic procedures leading to old stable constitutions had not been expurgated by whatever informal debates and mobilizations surrounded their enactment. Third, the image of the people galvanized and excited by the public spirit in dramatic moments results in questions regarding the epistemic quality of such moments. Where is the space for ample public discussion in such moments? Is discussion and decision by all the participants guaranteed in such moments? Are minority views adequately protected? Perhaps the epistemic quality of democracy is better secured in the less romantic but calmer moments of normal politics. Fourth, the democratic legitimacy of the results of the constitutional moments is also questionable because a simple majority cannot change the status quo when it is protected by entrenched clauses. This necessarily implies that a minority may prevent one of those moments from culminating in actual reform. If there were not these entrenched provisions the system would be a monist one in Ackerman's classification. In the fifth place, the legitimacy of the expressions of normal politics would be questionable as well, since, as Ackerman makes clear, the representativeness of the branches of government is problematic according to his theory.⁵⁷ The legitimacy of any government derives

⁵⁶ *Id.* at 108-13.

⁵⁷ *Id.* at 181-83.

from the delegation made during a constitutional moment. Thus, any form of government agreed upon in one of the rare constitutional moments would be legitimate. Sixth, Ackerman does not solve the temporal difficulty of the present legitimacy of a democratic decision made by people who died two centuries ago, especially when it is opposed to the will of present people as expressed in parliamentary elections. What is the difference between this and holding that the people in a distant territory are bound by what a foreign sovereign decides for them? Ackerman's response relies on the diverse quality of the two expressions of popular will given their different degrees of mobilization and debate.⁵⁸ However, the higher quality of an expression of will that has zero binding value does not raise that value so high as to equate it with another expression of will of very poor quality but with substantial binding value since it retains some connection to the preferences of the people who are affected by that will. Seventh, as applied to judicial review there is no reason why the will of "We the People" should be preserved by counter-majoritarian organs and not by those who at least have some direct connection with present majorities. Eighth, the subjection of judges to the collective will, no matter what its contents, is implausible as an expression of an ideological variety of legal positivism; to say that freedom of religion or expression could be abolished by a constitutional amendment and that judges should ignore those freedoms or else resign, seems to ignore the fact that sometimes the highest moral duty of a judge is to take advantage of her position and rescue some freedoms and lives.⁵⁹ It would be strange to ignore this possibility given the fact that Ackerman does not ascribe epistemic quality to the results of a democratic process. Finally, although the degree of public involvement that democratic politics requires should be a legitimate concern from a nonperfectionist perspective, it is excessive to account for that problem by a bifurcating politics which, according to Ackerman, has given the American people only three opportunities to make themselves directly heard in two centuries of an eventful history.

In concluding this section one may assert that an argument based on the epistemic value of democracy seems to imply a radical rejection of the possibility that judges should exercise judicial review. Whether the constitution is conceived of as a set of morally valid principles and procedures or a historically datable text or practice, nondemocratic organs not directly involved in the democratic process

⁵⁸ *Id.* at 131-62.

⁵⁹ A few judges applied this concept during the last dictatorship in Argentina.

of discussion, such as the judicial branch, should not be able to invalidate statutes or other laws with a genuinely democratic origin.

The previous arguments lead to the conclusion that judges must necessarily rely on the moral principles normatively embodied in the constitution to justify the application and interpretation of the laws. However, that conclusion is neutralized since it indicates that judges have epistemic reasons for recognizing and applying democratically enacted laws, as evidence of the valid moral principles upon which they rely. While an undemocratic positive constitution withers away from the picture, the moral or ideal constitution still *logically* takes priority over democratic legislation for justifying decisions. But, from the *epistemic* point of view, democratic legislation evidences the principles of the ideal constitution. Hence, judicial review of the constitutionality of democratic laws is an expression of epistemic moral elitism, since it supposes that a few nonelected officials, quite removed from the political fray, are better equipped to decide the impartial principles that the laws must satisfy than the very people concerned with those laws (their directly elected representatives).

It might now be appropriate to review the tortuous route that my arguments have followed up to this point. First, I have tried to demonstrate that judicial review is not a logical consequence of having a supreme positive constitution since this fact is compatible with the absence of any form of such review. However, I believe that if the constitution is conceived of as a set of valid moral principles and procedures, rather than as a positive social practice or text, then it seems inevitable that judges resort to it in order to decide the interpretation and application of positive laws. Finally, I have suggested that democratically originated positive laws can operate epistemically to indicate the content of valid moral principles, despite the fact that the structure of a judge's practical reasoning leads her toward a moral or ideal constitution, since positive laws cannot be the ultimate reasons for action. This follows as the democratic procedure generating those laws is a more reliable way to determine the right intersubjective moral principles than the individual reflections of a judge. The positive or real constitution cannot generally serve as a guide to those principles given its relative lack of democratic legitimacy as compared with the continuous working of the legislative process. Therefore, judges, as officeholders originating and operating outside of the process of collective discussion and decision, cannot disqualify the normative outcomes of that process by alleging a better understanding of the moral principles that serve as the basic premises of practical reasoning to justify decisions.

This radical rejection of judicial review enjoys considerable weight since it follows from the only stance that overcomes the exceedingly striking implications of complete legal nihilism. However, the radical extremes that these arguments present cause suspicion about the cogency of the present argument. The extreme democratism implied in this view is self-defeating since, as has been often observed, democracy could eat its own tail if certain conditions were not preserved even by undemocratic means. Besides, the conclusion extracted from the combination of the two arguments, that positive constitutions not generated entirely by democratic procedures are completely irrelevant to justificatory practical reasoning, are entirely counter-intuitive. It seems incredible that the numerous struggles⁶⁰ for the respect of a certain positive constitution are in the end absolutely fruitless. For logical reasons, a social practice, the speech acts generating it, or the document which results from it (together, what we take to be a positive constitution) cannot logically play any role in justificatory practical reasoning.

However, I shall not use these intuitions to prove the present argument's falsity (since I think it valid). Instead, I shall heuristically account for those intuitions in order to see whether the argument is subject to certain *conditions*, so that the nonsatisfaction of those conditions establishes the limits of the argument, and thus provides relevant leeway for the recognition of judicial review. I shall focus separately on three different assumptions of the epistemic justification of democratic laws which lead to the denial of judicial review. In each case, the complement of the respective assumption, that is, the proposition that describes the opposite states of affairs, will provide a different foundation for making inroads in the denial of judicial review, leading to the acceptance of diverse kinds of judicial review. The resulting scheme will be a theory of judicial review composed of a denial, which assumes some conditions, and three ample exceptions, based on the nonsatisfaction of those conditions and which will appear far less provocative to ordinary legal conventions than my partial conclusions so far. Additionally, I hope this argument offers a more solid philosophical basis for the institution than common sense alone.

A. *The First Exception to the Denial of Judicial Review: Control of Democratic Procedure*

The first inroad into the previous denial of judicial review is the easiest to substantiate and may be familiar to many. It springs from

⁶⁰ Such as the efforts for an Argentine Constitution after 1983.

the simple realization that not everything that is called "democracy" is a process with the epistemic quality that makes its enactments a reliable guide to moral principles. Democratic process is not an inorganic and spontaneous activity, but rather is subject to particular rules designed to maximize the epistemic value of that process. Democracy's epistemic value depends on a variety of factors: the breadth of participation in the discussion and decision of those affected by the latter; the freedom of participants to express themselves in the deliberation; the equality of the conditions under which that participation is carried out; the satisfaction of the requirement that the proposals be properly justified; the subsequent concentration of the debate on principles for justifying different balances of interests (not the mere presentation of those interests); the avoidance of majorities frozen around certain interests; the amplitude of the majority supporting the decisions; the time that has passed since the consensus was achieved, and; the reversibility of the decision. The rules of the democratic process insure that these conditions as well as others exist to the maximum degree possible.

The question is: Who safeguards the rules of the democratic process? The democratic process cannot be entirely self-regulated since this would prevent the correction of wrongs brought about only by the departure from rules and conditions which ground the process's epistemic value. This has led some scholars who examined the counter-majoritarian difficulty, like John Hart Ely, to conceive of the judiciary in its exercise of judicial review as a referee of the democratic process, whose essential mission is to see that the procedural rules and conditions of democratic discussion and decision are not violated.⁶¹

One could object that judges are not directly affected by the distortions of the democratic system because they are not directly subject to that democratic system. Hence, why should they be better suited than democratic bodies (even with the vices that affect democratic operations) to detect those distortions?

Primarily, since *anybody* has reasons to defer her own moral judgment to the contrary decision by democratic institutions, *anybody* is entitled to determine if and to what degree the conditions that determine that deference (the conditions that ground the epistemic value to the democratic process) are satisfied. A judge has no more legitimacy than any citizen who is applying a legal norm for justifying an action or decision and is compelled by the structure of practical rea-

⁶¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

soning to resort to autonomous or moral principles. One can only be relieved of that burden if the conditions for relying on the epistemic quality of the democratic process for detecting those principles are given. This may only be determined by individual reflection and not from the results of the democratic process, since the value of that process is at stake. Therefore, the judge has no alternative but to determine whether the collective process leading to that law satisfied the conditions of democratic legitimacy, just as he has no alternative but to determine how the law originated.

Secondly, since the intervention of the judges is by nature unidirectional, judicial activism is always directed to broaden the democratic process, requiring more participation, more freedom to the parties, more equality, and more concentration on justification. It would be absurd, under this conception of judicial review, for a judge to nullify a law because it was enacted through too broad and equal a process of participation and discussion. Sometimes judges may be, and often are, mistaken in their conclusions about the operations of the democratic system, but the overall effect of a procedural judicial review is the promotion of the conditions that grant to the democratic process its epistemic value.

Many of these conditions are the content of individual rights. Those rights may be deemed "a priori rights" since their value is not determined by the democratic process but is presupposed when the value of the latter is assumed. A certain analogy exists between this determination of a priori rights and the transcendental method through which Kant⁶² determined the truth of synthetical a priori propositions.

If experience is a good basis of knowledge, preconditions of experience should also give us some knowledge. Likewise, if democracy is a good basis of moral knowledge, preconditions of democracy should also be part of that moral knowledge. These a priori rights should be respected by the democratic process as a prerequisite of its validity, and it is the mission of judges to guarantee that respect.

Certainly, it is quite a controversial question to determine the range of a priori rights, distinguishing them from a posteriori rights, which are established by the democratic process itself. Some a priori rights are obvious: the active and passive political rights and freedom of expression are clearly central to the working of the democratic system. These rights presuppose other more basic rights, such as the

⁶² IMMANUEL KANT, *CRITICA DE LA RAZON PURA* 121 (José de Perojo trans., 1961).

security against arbitrary deprivations of life and limb, and politically motivated freedom of movement.

However, there are other a priori rights that are more controversial. Take the case of the so-called *social* or *welfare* rights. These rights are not antagonistic to the classical individual rights but are the natural extension thereof.⁶³ This becomes apparent when one recognizes that a classical individual right, like the right to life, is not only violated by positive acts but also by the failure to provide the resources necessary to preserve those rights, like medical attention, food, and shelter. The reluctance to accept that omissions are violations of human rights derives from critically accepting current social conventions which unjustly ignore the ascription of *causal* effects to omissions, by ignoring the duty to act positively to avoid the harm. However, once this stance is accepted the counter-majoritarian difficulty of judicial review becomes much more dramatic, since any political decision may ultimately affect, by action or omission, an individual right. Even if the present procedural approach of judicial review is accepted, its scope would be too broad, since the social and economic conditions of individuals (their level of education, their health, their strength vis-à-vis the pressures of the labor market) are preconditions for free and equal participation in the political process. This again raises the question of why judges should be in a better position than legislators, immersed in the democratic process, to make extremely controversial decisions about how to distribute limited social resources and about how to choose the most adequate social mechanisms to carry out that distribution.

There is no algorithmic formula to solve this question. There are resources so fundamental to the preservation and promotion of human rights that they must be provided as a precondition for the participation in the democratic process, or the quality of this process loses all epistemic value. A starving individual⁶⁴ is just as disenfranchised as one who is threatened for his ideas. And each individual that is not free to participate in the democratic process proportionately reduces the epistemic value of that process. However, we must be careful when we interfere with the democratic system for its own protection; otherwise the system could end up being reduced to a minimum expression, limited to cases of social deprivation. If we decide which resources are required as a precondition to the proper working of the democratic system, we prevent that system

⁶³ NINO, *supra* note 12, at 217.

⁶⁴ Or a very ill individual, deprived of medical attention, or one lacking the minimum access to mass media to express his own ideas.

from determining the final distribution of those resources. As a result, we could have an epistemically magnificent democratic system that is only allowed to decide a few things.

Therefore, we must confront this tension between the strength and the scope of the democratic process. The more we enhance its epistemic quality by expanding a priori rights so as to cover enough resources to insure freedom and equality of participation, the narrower the range of matters decided by that democratic process. Once a certain threshold is surpassed, the democratic system has some capacity to correct and improve itself because of its inherent tendency toward impartiality, providing people with the preconditions that allow for their equal and free participation. On the other hand, if that threshold is not reached, the vices of the process will intensify, and the character of the solutions promoted by the unequal or constrained participation will lead to further inequalities and restraints on the participation of the people. While there is no exact formula to locate this threshold, there are general guidelines that a judge, or for that matter anybody, must take into account. She must determine whether the vices of the "democratic" system are so serious that they render its epistemic reliability below that enjoyed by the isolated reflection of an individual. If it is positive, then she must act on the basis of her own moral judgment, both in order to solve the case at hand and to promote a course of action that will improve the future epistemic quality of the system. Often these two objectives can be achieved by the same decision. Of course, there is no further epistemic authority with which to guide oneself when deciding whether to defer to the epistemic authority of the democratic system or to decide on the basis of one's own light. This decision about the best epistemic process for achieving just decisions must be made in isolation.

B. *The Second Exception to the Denial of Judicial Review:
Personal Autonomy*

The very justification of democracy that I have alluded to also marks the limits of the value of democracy. Democracy's value is grounded in the greater reliability of the democratic process to arrive at morally correct solutions, as compared to alternative methods of decision making. This depends on the fact that democratic decisions are reached impartially and the process contemplates all the interests affected. The idea of impartiality is, of course, highly complex and controversial. I believe that it includes universability, generality, and notions of the separateness of individuals. But it is clear that not all moral standards or requirements depend on impartiality for their va-

lidity. The ideals of a good patriot, of a good soldier, of a responsible parent, of a life devoted to knowledge or beauty, of integrity and honesty, of religious commitments, can only tangentially be associated with the idea of impartiality.

In *The Ethics of Human Right*,⁶⁵ I distinguish between two dimensions of morals: public, intersubjective, or social morality, which consists of those standards that evaluate actions for their effects on the interests of individuals other than the agents, and; private, self-regarding, or personal morality, which is constituted by those ideals of personal excellence or virtue that evaluate actions for their effects on the quality of the life or character of the agents themselves. The value of autonomy, which is presupposed in the very practice of moral discourse, allows for the interference with the first dimension of morals, since the free adoption of intersubjective moral standards (which materialized the value of autonomy) may result in some actions which adversely affect the autonomy of other people. If, for instance, freely accepted standards allow the agent to kill or injure others, other people will see curtailed their own possibility of acting on the basis of freely accepted moral standards. Instead, the benefits of complete autonomy implicit in moral discourse do not justify the restriction of the free adoption of self-regarding or personal ideals, because that free adoption cannot result per se in the curtailment of the autonomy of other people, except when it implies the acceptance of an intersubjective moral standard, which allows the action notwithstanding its effect on other people. For instance, if somebody adopts an ideal for his life that includes the killing of other human beings, the interference with it is not justified on the basis of disqualifying that personal ideal, but on the intersubjective standard that allows for pursuing such an ideal.

When we participate in moral discourse we implicitly value the end of that practice (others freely accepting our proposed principle) over the general value of moral autonomy implicit in our practice of moral discourse. We may infer from this the more specific and unrestrained value of personal autonomy (this is the value of the free adoption of ideals of personal excellence and of the life plans based on them). An additional argument to ground this value of personal autonomy is the self-defeating character of imposing personal ideals upon others. Unlike intersubjective moral standards, imposed personal ideals are never fully satisfied since they include free adoption as an essential requirement. The moral standard of a good patriot is not satisfied by people who are coerced into singing the national an-

⁶⁵ NINO, *supra* note 25, at 131.

them.⁶⁶ In contrast, the moral standard against killing other people is satisfied when people are coerced into not killing.

Additionally, the validity of personal ideals does not depend on the satisfaction of the requirement of impartiality. Therefore, collective discussion and decision, which are likely to satisfy that requirement, are not substantially more reliable than individual reflection for arriving at morally correct solutions. Possibly the *discussion* of those ideals has some value, since intersubjective confrontation is always useful for increasing our information, overcoming factual errors, and surmounting our conditioning. But certainly the collective *decision* does not enhance the epistemic value of the adopted solution, since the goal is not to achieve a balance between conflicting interests of different individuals.

Therefore, judges have no reason to defer their moral judgment to a democratic statute that *is based on personal ideals of virtue or excellence*. In this case, the epistemic ground which justifies applying democratic norms over the personal judgment of the judge is missing. This contradicts the foregoing arguments, which imply that in matters of personal morality only the judgment of the agent himself is relevant. Consequently, judges ought to revise, and eventually disqualify, "perfectionist" laws and other norms of democratic origin.⁶⁷

Before disqualifying a democratic law because of its perfectionist nature, the rationale or ground by virtue of which it has been enacted must be considered. This is because the concept of personal autonomy leads not to the protection of particular actions, but only to the exclusion of the possibility that they be interfered with *on the basis of some kind of reason*. Recall the extreme example where a personal ideal allows the killing of another; the state or another individual interferes with that action not because they object to the personal ideal on which it is based, but because the action also adopts an unacceptable intersubjective moral standard that permits it. An example of perfectionist legislation is the punishment for the possession of drugs for personal consumption alone. What disqualifies that legislation is that its real ground is the imposition of an ideal of human excellence. If the law's rationale was actually an indirect protection of unwilling third parties, then the soundness of the legislation would be something to be discussed through the democratic process and not the judi-

⁶⁶ This argument was advanced in Argentina against prosecutions for scorn to patriotic symbols.

⁶⁷ By "perfectionist" laws I mean those laws that attempt to impose on people an ideal of personal virtue or excellence; see NINO, *supra* note 25, at 133.

cial one.⁶⁸ This demonstrates an element essential to understanding the judicial role in the review of constitutionality. A judge cannot avoid taking into account the genuine reasons behind the legal norms, since this is what constitutes their meaning, determines the rationality of their application to a certain case, and controls their constitutionality.⁶⁹

Of course, this second avenue along which judicial review may proceed has implications for the evaluation of controversial decisions in many diverse forums. The United States Supreme Court decision in *Bowers v. Hardwick*⁷⁰ cannot be justified, since the Georgia statute proscribing homosexual behavior was clearly based on perfectionist grounds. In Argentina, this view would support the position of the Supreme Court in *Bazterrica*,⁷¹ which overturned the law punishing the mere possession of drugs. This was subsequently overruled by *Montalvo*.⁷² The test for evaluating these decisions is whether the rationale underlying the proscription of the act involves adherence to an ideal of human excellence and the subsequent disqualification of others, or only the adoption of some intersubjective moral standards and general factual hypotheses that should be decided by the political process.

C. *The Third Exception to the Denial of Judicial Review: The Constitution as a Social Practice*

The previous justifications for judicial review did not ground the relevance of a *positive* constitution, the origin of which is not entirely democratic, for judicial review. The control of the democratic procedure, the first exception, must be done in the light of some *ideal* regarding the workings of democracy, since both the structure of legal practical reasoning and the justification of democracy do not allow judges to recognize the distortions of the democratic procedure that might be enshrined in a positive constitution. To take an extreme example: Why should a judge abide by constitutional norms that restrict the franchise, when the constitution itself was enacted by a restricted constituency? The same question is raised with the protection of personal autonomy: If a judge does not have a constitution that consecrates the value of personal autonomy, such as Argentina's, or

⁶⁸ This would be so even when the factual basis of this rationally was erroneous.

⁶⁹ This connects with the idea of "enantiotel," the requirement that for a crime to be punishable it must produce the risk or harm that the criminal law in question seeks to prevent. See CARLOS S. NINO, *LOS LÍMITES DE LA RESPONSABILIDAD PENAL* (1980).

⁷⁰ *Bowers*, 478 U.S. 186.

⁷¹ 308 Fallos 1412 (1990).

⁷² 309 Fallos 601 (1990).

even if he has a constitution that denies that value, must he still defer to the democratic process on a question of personal ideals? Given the undemocratic origin of the constitution, a judge cannot resort to a democratic determination expressed there. This would imply a position of intersubjective morality that would allow legislation based on personal ideals. The judge can only disregard what the positive constitution says on matters of personal autonomy. If it coincides with what is required for the respect of that value, then it will be valid but superfluous.

Unlike these two avenues of judicial review, the third is an attempt to salvage the moral relevance of the positive or real constitution, and not merely the ideal or moral one.

This exception to the denial of judicial review differs in that it does not merely evolve out of the analysis of the conditions of the democratic process, but results from a deeper conceptual layer. It stems from a reevaluation of the structure of justificatory practical reasoning. This exception overcomes the conclusion that positive legal norms, including the constitution, are not relevant to that practical reasoning without appealing to the epistemic reliability of democracy.

I propose to examine the constitution, and the legal system that emerges from it, as a social practice or a convention. This involves the regularity of conducts, the critical attitudes toward those conducts, the expectations that others will act in a certain way, the motivations for action, and possibly the goal of the whole practice served by the regularity of actions. These will generally solve problems of coordination, allowing people to converge around some *salient* element of the situation.⁷³

There have been many attempts to explain why the constitution and the legal system (understood as a social convention) may be relevant as the content of a premise of a judge's practical reasoning for making a decision. Most of these attempts, despite their different guises, conceal a conventionalist or positivist, and hence, relativist, view of morality (such as the present resurgence of the old communitarian way of thinking).⁷⁴ The common objections to this view follow: This view of morality does not take into account the Humean divide between "is" and "ought" when it offers a social convention as the ultimate justification for an action or a decision. This justification ig-

⁷³ See David Lewis's analyses of conventions and social practices, *CONVENTION: A PHILOSOPHICAL STUDY* (1989); HART, *supra* note 23; DWORKIN, *supra* note 50.

⁷⁴ See Carlos S. Nino, *The Communitarian Challenge to Liberal Rights*, 8 *LAW AND PHIL.* 37 (1989); NINO, *supra* note 25, at 83.

noses the fact that the main trait of the *modern* practice of moral discussion is to subject every social arrangement to criticism. Additionally, the fact that *positive* morality necessarily presupposes references to an *ideal* morality is not taken into account. Furthermore, conventionalism cannot explain the position of a minority in a moral dispute, since according to its precepts, that position should be false *by definition*. Lastly, it cannot account for rational moral discussions between groups or societies that practice different conventions.

Ronald Dworkin, among some others, has attempted to defend milder versions of the position that the constitution and the legal system at large, being the result of a collective action extended over time, is relevant for the premises of practical reasoning.⁷⁵

Professor Dworkin's theory suggests that judges should make decisions by taking into account the best principles that have justified the decisions of the past present. He grounds this view of justificatory practical reason, which he calls "a community of principles," in the value of *integrity*, which manifests itself in a society whose officials follow a consistent set of principles. The discussion of this intriguing position merits careful attention. However, I am limited to summarizing my previous criticism⁷⁶ to the effect that the value of integrity is not strong enough to justify judges' being tied to defective principles that perpetuate unjust prior decisions. Integrity⁷⁷ is valuable as a personal trait, since it shows a depth and breadth in the moral character of the agent that is not exhibited by somebody reacting inconsistently when confronted with different circumstances. But *intersubjective* or *social* integrity loses value (except the superficial one of foreseeability and certainty) unless we personify the society. Dworkin accepts this, except that he says that it does not involve any metaphysical commitment. However, this is not a case of just using an heuristic device or a logical construct, but rather ascribing to the social whole some sort of character or *élan* that is valuable enough to make up for injustice.

My attempt here⁷⁸ differs from that of the others in that I shall not try to show that the constitution as a convention is relevant to the *premises* of legal reasoning. Instead, I shall focus on the subject matter of its *conclusion*, the kind of pragmatic normative judgment that culminates the reasoning.

In the above arguments I assumed that the conclusion of a piece

⁷⁵ See RONALD M. DWORKIN, *LAW'S EMPIRE* 130-35 (1986).

⁷⁶ See NINO, *supra* note 25, at 100.

⁷⁷ I define integrity as acting consistently on the basis of coherent principles.

⁷⁸ I developed this view more fully in CARLOS S. NINO, *DELIBERATIVE DEMOCRACY AND CONSTITUTIONALISM* ch. 5 (forthcoming 1993).

of practical reasoning undertaken by a judge is an *individual* action or decision. For instance, I presuppose that a judge must justify her decision to put someone in jail or evict someone from his house, and that the conduct of the judge does not differ substantially from ours when we make everyday decisions that we must justify on the basis of reasons.

However, there is an essential difference between the actions of persons performing in the context of a legal practice and other actions performed in a nonlegal context. The former are *institutional* actions which are performed as part of the practice of the law within a community. The effect of an action is entirely different when it is performed as part of a social practice, since that effect is determined by a series of expectations and attitudes of that practice. The action of the judge sentencing someone to prison has a wholly different effect than a similar action that I intend to perform.

Participating in a legal practice is analogous to building a cathedral. It would be highly irrational for an architect who is asked to complete part of the cathedral to act as if he himself were building the whole cathedral. He must consider in his choice of style or materials the decisions made in the past and the decisions that will probably be made in the future. Perhaps he must satisfy himself with second-best options that nevertheless better agree with the collective enterprise. Though finally he must rely on aesthetic standards as ultimate reasons, he must apply those standards to the collective work and not only to his contribution. Perhaps his conception of a cathedral, built alone, is impossible to apply to an ongoing collective work. Of course, the architect may decide that the ongoing enterprise is so far away from his preferred aesthetic sensibilities that he is not justified in contributing to it. He may feel obliged to refund the construction of the cathedral, which will often not be successful since others will not agree to his vision of the cathedral but will continue to adhere to the previous one; he may also choose to destroy the present cathedral, or to do nothing at all. However, if he decides that the cathedral under construction is worthwhile according to his aesthetic conception, he must seek ways of contributing to it that insures the continuation of the work, as well as the closest approximation to his preferred conception.

I think that something similar happens in the case of the legal system. The role of the architect is occupied by the constitution makers—legislators, judges, and citizens at large. Except for some exceptional dictators, none have complete control of the whole practice, but only the opportunity of a greater or lesser contribution to its develop-

ment. The positive constitution may be seen as a successful attempt to lay the foundations of social practice on which the law of a community is built. There may have been many similar attempts to found a legal practice, perhaps sometimes better inspired, that have failed to both constitute the salient element around which the attitudes and expectations of the rest of the agents happen to converge, and provide the basis to coordinate the collective behavior.

Legal actions are the contribution of various individual agents performing converging acts with a collective intention. The decisions of democratic branches, of judges, and even of common citizens benefit from the attitudes and expectations that are part of the practice. This, in turn, generates new attitudes and expectations which in turn impact the result of other actions. The acknowledgement that legal actions are not isolated conduct but pieces of a conventional process modifies the traditional vision of what is the *object* or the *subject matter* of legal practical reasoning. Though it is true that reasoning, in order to have justificatory character, must necessarily start from moral principles (universalizable principles autonomously accepted), their object of application is not isolated actions or decisions, but the legal practice as a whole. This conclusion coincides with Rawls's idea that principles of justice do not apply directly to actions and decisions but to the basic structure of society.⁷⁹

Thus, legal practical reasoning is a two-stage process (as rule-utilitarianism proposes that it should be). First, the justification of the practice as a whole must be determined in the light of autonomous principles of justice and social morality, whether the practice as a whole is justified and is thus morally capable of contributing to its continuation. This valuation should take into account what could be the realistic alternatives to that contribution, like working to undermine the present practice, trying to promote a new one, or doing nothing at all. If the first stage in the practical reasoning results in a positive answer, it is necessary to engage in the second stage of the practical reasoning (the positive answer to the first question could be a *conditional* positive answer, which makes the justification of contributing to the continuation of the practice depend on the possibility of reorienting it toward a closer satisfaction of the moral principles). In the second stage, one decides the best action or decision while allowing the continuation of the practice and the maximization of the satisfaction of the principles found out in the first stage. On many occasions the practice, which includes interpretive conventions, is extremely lax and indeterminate. In these cases, the preservation of the

⁷⁹ See RAWLS, *supra* note 41.

practice is completely compatible with a free search for the satisfaction of the basic moral values. In other cases, the interpretive conventions are rich and unequivocal and provide very little leeway to resort directly to first-stage values. Most often, however, there is a tension between alternatives that would consolidate the practice but would affect its moral quality, and alternatives that produce the opposite result. There is no algorithm to resolve this tension; the general considerations that the agent must take into account to justify a decision on the basis of the law are her moral principles, and that possibility that without a practice she probably cannot make any effective decision at all.

In the context of judicial review, even a democratic decision is an institutional action that has an effect on the framework of a legal practice. Rarely is a democratic decision effective enough to initiate a new legal practice or to substantially reorient the present one. Even constitutional reforms must be generally based on the present constitutional practice in order to provoke the right attitudes, expectations, and conduct. Therefore, the effects of the democratic decision depend on the continuity of the practice. Nevertheless, the decision itself may undermine that continuity, which could reduce the efficacy of other decisions.

Consequently, the role of judges is rather more complex than we have seen thus far. Besides accounting for the epistemic value of democratic decisions, they must preserve the decisions' efficacy, so they remain relevant. Perhaps there are more democratic ways of making decisions that might be irrelevant because they are inefficacious. This involves a double scrutiny: first, the measure to which the democratic decision will reflect the attitudes and expectations that constitute the legal practice; second, the extent to which that decision affects the flux of attitudes and expectations that would render other decisions efficacious. Of course, this also presupposes a valuation of the practice as morally plausible, or a determination of whether the maximization of that moral plausibility requires reorienting the practice.

The historical constitution represents a successful foundation for the present legal practice. If the practice as a whole is morally justifiable when measured against the realistic alternatives, it becomes the main responsibility of judges to insure that constitutional deviations do not undermine the legal practice (foreclosing reorientation or transformation). This is a very complex task since the judge must assume the practice is justified, but also account for the tension between the democratic decision and the value of that practice. However, if the decision is relevant, it is only because of the practice, and

the practice may be the result of some past decisions, which may or may not themselves possess democratic validity. Thus, the judge must weigh the conflicting considerations.

Though this exception to the denial of judicial review grounded on the epistemic value of democracy presents difficult problems, it is extremely significant. Many blunt offenses against the most obvious interpretation of the constitutional text by democratic officials cannot be disqualified on the basis that the democratic process is affected, nor can they be disqualified on the basis of personal autonomy by resorting to the central role that the constitutional document, the adherence to it, and the interpretive conventions forged around it, play in the evolvment of a legal practice (the continuation of which is a precondition of both the democratic process and of the judicial capacity to preserve it and personal autonomy). This explains the relevance—subordinated to moral principles—of positive laws in the context of practical reasoning.

CONCLUSION

After trying to dismantle the institution of judicial review to exhibit the logical bones that underlie its draping, I tried to reconstruct it in a way that respected that basic logical structure. The result of that reconstruction is a theory of judicial review which, I trust, is less alarming to legal common sense, which some of my partial conclusions must have led some to fear. Though there is a general denial of judicial review of the constitutionality of those laws which originate through the democratic process, there are three very significant exceptions to that denial. These exceptions involve deciding whether the enactment of the law respected or will affect in the future the preconditions of the democratic process, including the a priori rights; the disqualification of laws grounded on perfectionist reasons; and the examination of whether the law in question undermines the preservation of morally acceptable legal practice.

I think that this reconstruction, if successful, will achieve several things. First, it will put the institution of judicial review on firmer philosophical ground, one based on an analysis of the structure of justificatory legal reasoning.

There also will be very practical implications of this reconstruction. One of them emerges once we understand that the foregoing considerations have assumed an institutional design in which judges have only an indirect connection with the democratic process. The only option that they face is whether or not to apply a law that may violate the constitution. However, both factors may vary and the con-

clusions may be different. For instance, a European-style constitutional tribunal, with members who are periodically renewed and who are chosen by different branches representative of popular sovereignty, possesses greater democratic legitimacy than a supreme court, like those of the United States or Argentina, in carrying out the functions of review that emerge from this theory. It is also possible to think of procedures that would ensure that the members of the superior courts that exert judicial review answer periodically to the democratic process, insofar as that does not imply a dependency on those exercising political power, but rather implies the support of a wide consensus constituted independently of that power.

Essentially, there are several judicial responses when confronted with a claim of statutory unconstitutionality. When the instrumental conditions for the protection or promotion of rights that involve the distribution of resources and the establishment of institutions are at stake, perhaps the intervention of the judicial power should not consist in an all-out disqualification of a statute or an administrative order. Rather, judges should be encouraged to adopt measures that will promote public deliberation over the issue within the political organs. For instance, judges may be given a veto power over statutes or measures that lie in the penumbra between a priori conditions for the correct working of the democratic process, and the determinations that must be made through that very process, obliging the legislature to engage in a new discussion and decision to override that veto. This type of system, which is similar to Canada's, deserves to be studied more carefully. Also, with regard to the so-called "unconstitutionality by omission"⁸⁰ (the failure of the legislator to implement a constitutional prescription), there should be the possibility of allowing a supreme court to obligate the legislature or one of its commissions to explain the reasons for that omission and whether there is some project under discussion to overcome the lacunae. Through these and other mechanisms,⁸¹ judges would have an active role in contributing to the improvement of the quality of democratic discussion and decision-making, stimulating public debate and promoting more reflective decisions.

Another practical implication of this reconstruction of judicial review would be to promote the judiciary's awareness of the complex considerations of their task. These considerations involve a triad of values that in fact are what constitute the complex idea of *constitutionalism*: first, the observance of the results of a democratic process

⁸⁰ See German Bidart Campos, *Las Omisiones Constitucionales*, EL DERECHO (1988).

⁸¹ Some of these proposals would require constitutional reforms.

of discussion and decision making; second, the respect for some individual rights; third, the preservation of a continuous legal practice (which absorbs the idea of the rule of law).

The first value relates to the epistemic quality of democracy, the second to democracy's limits, given its procedural preconditions and the value of personal autonomy. The third is self-explanatory. All of them derive, as I have tried to show in this study, from structural features of legal reasoning and cognition.

Each of these three elements of constitutionalism that a judge must be aware of in judicial review may be in tension with the other two. The democratic process may undermine a priori rights and the continuation of a solid legal practice. The preservation of individual rights as preconditions for the epistemic value of the democratic process may redound, as we saw, in a considerable narrowing of the scope of that democratic process and in the undermining of a legal practice that is not as favorable to that preservation. The continuation of a solid legal practice may imply disqualifying some democratic decisions which undermine it, or leave unprotected some individual rights that are not recognized by that practice.

But, after some threshold is surpassed, each of these three elements of constitutionalism may become mutually reinforcing. Democracy's epistemic value increases if a priori rights are respected. Also, democracy is benefitted in the efficacy of its decisions if the legal practice, in the context of which the democratic decisions are taken, is consolidated. Individual rights tend to be protected by a well-functioning democratic system and by the observance of the rule of law. The continuation of the legal practice is promoted when that practice harbors the democratic process and a due respect for individual rights.

The more than Herculean task of the judges, and indeed of anyone engaged in justificatory legal reasoning, is to balance these three elements of constitutionalism when they conflict, trying to reach the threshold at which their vicious, debilitating, mutual tensions transform themselves into virtuous, fortifying, mutual support.