The Dignity of Legislation (Seeley Lectures No. 2)

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Jeremy Waldron, Professor of Law at Columbia University, has set himself a challenging task. He fears that legal and constitutional scholars hold too low a view of legislatures: they despise parliamentary politics as a grubby arena where numbers trump reasoned principles. This, especially when they also hold too rosy a view of courts (p 2), leads them to an unwarranted institutional preference for judicial over political decision-making (pp 3–4).[1] This error is common to both the political Right (e.g. the Public Choice school's suspicion of politicians' 'rent-seeking') and the Left (which fears that majorities will impose their own prejudices to the detriment of minorities' lifestyle choices). Both wings denigrate legislation as reflecting nothing more than irrational prejudice or rational self-interest — either way, nothing principled with any claims that dissenting citizens are bound to respect. Some jurists (Langdell, Maine and Seeley himself) are, like Hayek, reluctant to accept legislation as true 'law' at all (pp 7–11). To rectify this error, Waldron wants to restore a recognition of the dignity of legislation. Legislating is itself an exercise of reason: individuals decide their concrete applications of such vague abstractions as 'justice' or 'natural rights' in common with others and after hearing *and taking account of* others' views. Waldron regards the legislative process, 'at its best', as one in which 'representatives of the community come together to settle solemnly and explicitly on common ... measures ... in a way that openly acknowledges and respects ... the inevitable differences of opinion and principle among them' (p 2).

Waldron is opposed to constitutionally entrenched and judicially enforceable Bills of Rights. What makes this interesting is that he is neither a conservative nor a socialist, but a liberal. This makes his position rare today, in an era when John Rawls' and Ronald Dworkin's views are the canonical definitions of liberalism. Yet, as seen, Waldron claims that Locke himself held the same combination of views, and notes that his students often misconstrue *On Liberty* as advocating some kind of constitutionalised First Amendment when what Mill sought was 'a strong barrier of moral conviction' (pp 82–83). Waldron notes that constitutions not backed by public sentiment are ineffective against despotic governments (p 84). Worse, they can *only* be effective against law-abiding democratic governments. Elsewhere, Waldron has given a much-quoted 'rights-based critique of constitutional rights', arguing that entrenching such guarantees exhibits an 'attitude of mistrust of one's fellow citizens' which 'does not sit particularly well with the aura of respect for their autonomy and

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[1] All page numbers are from *The Dignity of Legislation*, as are all emphases in quotations, unless otherwise indicated.

responsibility that is conveyed by the substance of the rights ... being entrenched'.[2]

Waldron's approach in *The Dignity of Legislation* (originally the Seeley Lectures) continues this unorthodox stance. Rather than calling in the usual suspects — Hobbes, Rousseau, Bentham or Dicey — to support his doctrine of democratic majoritarian positivism, Waldron instead turns to 'three rather unpromising canonical sources' (p 5): Aristotle, John Locke and Immanuel Kant. Although their best-known doctrines are 'not commonly associated with the idea of the dignity of legislation' (p 5), says Waldron, other aspects of their work actually support his position. This is an ambitious gamble. If Waldron can show that the patron saints of political virtue, natural rights and individual moral autonomy respectively are proto- or crypto-democratic positivists, this pulls the rug out from under rival theorists — such as Dworkin, Rawls and the Public Choice school — who invoke their names to support counter-legislative resistance, especially judicial activism.

First, Waldron examines 'Kant's positivism' (Chapter 3), noting that the apostle of individual conscience held a view of the social compact even more collectivist than Hobbes' version: it is our moral duty, not merely enlightened self-interest, to form an organised society with our neighbours (pp 57–59). Thus to resist the community's organised decisions is 'an affront to the very idea of right' by Kant's standards, because it could mean reverting to the war of each against all (p 59). Kant acknowledged that even if humans are benevolent rather than selfish, clashes still arise if they *act* according to 'what seems right and good' to each (pp 43, 46). While it is 'not inappropriate for force to be used to secure justice and right', the very 'point of using force in the name of justice is to *assure* people of that to which they have a right', and 'If force is used by different people to secure ends which contradict one another, then its connection with assurance is ruptured.' (p 56)

Next, discussing 'Locke's Legislature (and Rawls's)' (Chapter 4), Waldron sharply distinguishes the *institutional* implications of these two namesakes' contractarian theories. Both agree that rights derived from nature and/or the social contract impose moral limits upon what legislators enact. But while Rawls assumes that such rights should be constitutionally entrenched and judicially enforceable, Locke instead considers the legislature the appropriate forum for translating these rights into law. In fact, Waldron concludes, Locke rejects 'the idea that the legislature is constrained by natural law conclusions that have been reached independently of its deliberations' (p 69). Lockeans should think of the legislative chamber not as 'a hall already enshrining the book of natural law, sitting in a glass case like the US Constitution in Philadelphia, awaiting the Congressmen or MPs when they arrive', or where legislators 'convene to apply to the circumstances of their own society natural law understandings that are already available to them', but instead, 'as somewhere they actually *do* their natural law thinking ... aloud and in the company of others' (pp 68, 69). (Despite some similarity here to

[2] Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights,' 13(1) *Oxford Journal of Legal Studies* (Spring 1993) 18, p 27.

'deliberative' or 'discourse' democracy, Waldron rejects the latter's implication that the persistence of disagreement proves some participants must have been motivated by ignorance or self-interest, instead of deliberating in good faith [pp 151–54].) The fact that Locke himself anticipates reasonable objections to, and clarifies counter-intuitive implications of, his own version of natural rights shows tacit acknowledgment that 'although there are right answers, they are not so obviously right ... that different individuals reasoning in good faith will not be led to different conclusions' (p 75). This explains both Locke's emphasis on the need for positive law and his rejection of unanimity as impracticable for legislative decision-making (p 75).

By contrast, while Waldron agrees with Rawls that sincere, reasonable and deep-seated disagreement over justice is unavoidable in modern societies, he complains that Rawls does not take this insight far enough. Rawls acknowledges dissensus but seeks to confine it to later stages of decision-making, after society has already agreed, from behind his famous 'Veil of Ignorance', to adopt his equally famous 'Two Principles of Justice'. But, Waldron objects, disagreement infects even conceptions of justice itself: 'Rawlsian liberals have done a worse job in acknowledging the inescapability of disagreement about the matters on which they think we *do* need to share a common view' (p 155). Rawls' four-stage sequence (first social contract, then constitution, statutes, and rulings) 'allows *no place at all* for deliberation among people who disagree about justice' (p 73).

Chapter 5 focuses close attention on Aristotle's discussion of the 'wisdom of the multitude', finding that it impliedly prefigures the modern goal of 'diversity' (p 112), in that 'a multitude may be more insightful than one excellent man [or a small clique] if its members ... spark off each other's dissonant ethical views and sharpen their moral awareness diacritically' (p 119). However, Waldron's use of Aristotle is less whole-hearted than his reliance on Kant and Locke: he concludes by acknowledging obscurities in the Philosopher's views on law and ostracism (pp 121–22).

Lastly, Chapter 6 deconstructs the 'physics of consent' to offer a justification for majority rule that goes beyond its intuitive 'obviousness' or 'naturalness', and answers the lurking suspicion that voting is an arbitrary and unprincipled way of finding the truth. Waldron notes that having a legislature that decides by majority is not the same as having a legislature that is representative of the whole society (p 125). Just as unrepresentative cliques may decide by majority, so too representative assemblies might combine universal suffrage with some other decision rule. So why then abide by the rule of 50 per cent plus one? Waldron re-examines both Locke's analogy of a vector of opposing forces moving a physical body (pp 133ff) and Hobbes' imagery of the more numerous side 'destroy[ing]' its opponents one by one until it alone has 'uncontradicted ... Voyce[s]' remaining (p 133). He notes problems with these metaphors: what if, instead, the 'body' falls apart, or moves to somewhere between the two sides, or even moves in the direction favoured by an intense minority (pp 131–33)? To answer such objections, Waldron reiterates Locke's insistence that consent is the sole 'force' that binds a polity together (p 136); like Rousseau, he views 'force' not as brute coercion

but as normatively binding moral force (pp 135–36). Contractarianism's tension between unanimous initial consent and subsequent obligation means the contracting citizens impliedly agree to a decision-rule requiring something less than unanimity. Because all agree in advance to be bound not by specific decisions but by a standing decision-making procedure, therefore all accept the risk that its decisions may go against them (p 139). This means the body politic does not break up when opposing forces clash. It also explains why the majority must select someone's proposal as an integrated package, rather than find a hodge-podge or median between majority and minority views: consent determines not only the choice but also the menu to choose from (p 142). Finally, Waldron answers the objection that zealous smaller groups often prevail over an apathetic majority by noting that although this is empirically frequent, that does not mean it *ought* to occur (p 143).

The Dignity of Legislation is a well-argued, readable work and a useful reminder that, contrary to the intellectual fashions of recent decades, one need not abandon liberalism for utilitarianism to be a positivist: a commitment to the rule of law need not (indeed, on Waldron's account, must not) entail the rule of judges. Waldron has a stimulating approach of working from first principles, of re-examining what is often taken for granted — of 'making sense (or nonsense) of the obvious' (p 126) — and of offering novel and forceful insights. In particular, he punctures the fond illusion of many contemporary liberal theorists that 'equal respect' requires judges to discover and enforce a wide range of 'fundamental rights' that were never voted into law by anyone. Too often the supporters of activism seem to dismiss political decisions they disagree with as though these were demonstrably wrong, like the apocryphal American State legislature declaring that *pi* equals 3. Waldron does not shy away from the reality of disagreement, and its implications for judicial activism. Elitists of Left and Right distrust democratic decisions because they fear outbursts of populist gay-bashing or bank-bashing, respectively. Waldron exposes the underlying disrespect embedded in these assumptions: true equality requires us to treat others not just as objects of our concern, but as subjects whom we must persuade.

However, I finished *The Dignity of Legislation* with unanswered questions, because Waldron shies away from the crucial point where the rubber of law hits the road of morality. Waldron maintains that those who want 'natural rights' or other overriding moral fundamentals to limit the legal scope of political decision are misguided. The point of legislation is to avoid civil conflict by subordinating individual views about right and wrong to 'a single, determinate community position on the matter' (p 39). If legislation is in turn re-subordinated to such vague standards as 'rightness' or 'justice', society is back to square one: 'The official's failure to implement the law because it is unjust, or the citizen's doing something other than what the law requires because that would be *more* just, is tantamount to abandoning the very idea of law ... of the community taking a position on an issue on which its members agree' (p 37). It is no good defending such reservations by protesting that only principled objections, not selfish ones, should be sufficient to resist legislative commands. First, people disagree no less intensely over moral principles

(p 38). Second, no neutral standard exists for separating principled from self-interested objections:

> Certainly, justice is affronted ... if the position identified and enforced as that of the community is wrong. But given the inevitability of disagreement on *that* issue ... there is no *political* way in which [this risk] ... can be precluded. All we can do, politically ... is to ensure that force is used to uphold one view ... only — a view which may be identified as that of the community by anyone, whatever their substantive opinions on the matter. (p 39)

Of course, the uniform judgments imposed by the community might be unjust too: Waldron acknowledges that this leaves Kant in 'the classic, but honest predicament of the true legal positivist' who has 'set out the advantages of positive law, and given an indication of what we stand to lose if we abandon it' (p 61). Even genuinely Lockean-minded legislators, 'like any human political body, may get the natural law wrong' (p 85). (This reminded me of reading the many nineteenth-century US state constitutions which begin by reciting that all men [*sic*] have inherent rights to life, liberty and property, then go on to interpret these rights to include slave-owning.) But, he warns, this 'is not a problem that can be settled ... by a definitive written formulation of what the natural law requires', because relying on 'yet another legislative body — a super-legislature, a constitutional convention, or whatever — is simply to postpone or reproduce the difficulty' (p 85).

This, unfortunately, is correct. After 1945, when it looked like the Nuremberg Trials had fatally discredited positivism by declaring national law subordinate to natural law, many societies sought to bridge the chasm by making justice and rights enforceable parts of their positive law. Many adopted rights guarantees in international covenants or domestic constitutions; others which had long had entrenched constitutional rights began to take them seriously, as demanding more than simple endorsement of traditional practices (e.g. in the United States, segregation and malapportionment). But this solution didn't work for long. Neither constitutionalised rights nor judicial activism can wish away the objections of those citizens who believe in all conscience that their government's positive laws are evil — even when these laws are declared by constitution-makers or judges rather than by legislators. The Operation Rescue activist who is ordered by a US judge to cease picketing an abortion clinic certainly doesn't consider *Roe v Wade* authoritative, even though it was declared by a Supreme Court which explicitly based its judgment on arguments about liberty, equality and justice.

To this extent, Waldron echoes Hobbes. But, unlike Hobbes, he regards democracy as preferable — even, impliedly but not expressly, as essential for law to have any legitimacy. True, if a definite rule of recognition is all we need, the judgments of a Supreme Court, or decrees of a king or president, can dispel disagreements just as clearly as can the Acts of a legislature. (Indeed, the one or the few are better able to issue prompt and specific commands than an assembly of the many.) We obey legislation not only because this settles disputes, but also because it settles them through the process that most clearly

respects the equal dignity and consent of everyone bound by it. Waldron cites Locke to argue that 'whenever there are controversies about natural law, it is important that a *representative* body resolve them' (p 87). We are bound if we are counted, and counted equally.

Waldron rejects the argument (underlying both liberalism and Benthamite utilitarianism) that a smaller number should prevail when their preferences are more intense. 'Unless a lack of intensity raises a question about the *reality* of the consent ... it doesn't particularly matter how enthusiastic or forceful the consent is.' (p 143) Anyone claiming that his or her own opinion (and any concurring opinions) should outweigh the opinions of a larger number 'must base that on there being something special about *his* opposition; and that would contradict the assumption of equality' (p 139). All consents, or refusals of consent, are equal: since we can't differentiate their quality, nothing relevant remains but their quantity. So we stick to what we know, and count heads.

Waldron does acknowledge the risk, noted by John Beitz (and elsewhere by Dworkin, Lawrence Sager and others), that such a 'narrow understanding' of equality may allow a majority to enact, on a head-count, policies that deny respect to minorities (p 162). Shouldn't we insist that *counting* everyone equally takes second place to *valuing* everyone equally? No, says Waldron, because 'this broad notion of respect is unusable in society's name'. It is precisely 'because we disagree about what counts as a substantively respectful outcome that we need a decision-procedure', otherwise we 'privilege one controversial view about what respect entails, and accordingly fail to respect the others' (p 162). To the democratic positivist, citizens can determine what the law *is* simply by consulting the legislature's clerk and the government printer, and in turn these officials can determine what the law *should* be simply by counting hands raised in the assembly. To those who tire of, say, Dworkin's intellectual shell games (is there *any* important question that ordinary voters get to decide, if they aren't judges or academics?), Waldron's doctrine offers an appealing simplicity and accessibility. Honesty, however, requires me to concede — I write this three weeks after the 2000 US presidential election — that in crucial cases it can be just as difficult to count heads, or to interpret Floridian ballot-cards with sufficient objectivity that all opposing sides accept the result.

But although Waldron refuses to limit the *force* of consent to what is intensely desired, he does limit the *scope* of consent to what was originally agreed; and it is here that he comes closest to conceding points that might compromise his positivism. Only a few pages before dismissing intensity of preference as irrelevant, he criticises some theorists for treating consent 'as a sort of "On/Off" switch that magically generates ... all the conclusions about political obligation that the most complete authoritarian would desire' (p 140). Instead, like Locke, 'we must allow the logic of consent to dominate the political implications of its having been given' (p 140). Individuals are not bound if their government uses its power for purposes they never consented to: 'a decision to join with others for common safety ... does not commit me to the group's conclusions about common worship' (p 140). Indeed, if our

government uses its power to act in ways 'patently destructive' of its original *raison d'être*, we are 'entitled to infer that the government must have gone beyond its bounds' (pp 140, 141). There is little here that Timothy McVeigh would dispute. So how does this square with Waldron's positivism?

The answer would depend on how Waldron believes individuals should *respond* to governmental acts transgressing the original agreement. A consistent positivist can endorse civil disobedience or even outright rebellion in extreme cases, as long as the dissenters honestly acknowledge that it is they — not the state officials suppressing them — who are acting 'contrary to law'. True, the rebels may well be acting more in accordance with *morality*, and will often label morality as 'divine law' or 'natural law' for rhetorical purposes; but they should not pretend that it is 'law' in the sense that Waldron means — i.e. a rule, made by and for a society, whose promulgation and meaning are obvious to everyone even if its morality or desirability are not. Dissidents must face the reality that the 'higher laws' that seem compelling to them are not obvious to their fellow citizens and therefore, if followed, could lead to civil disorder. As Shirley Robin Letwin, a conservative positivist, argues: 'However wise the Americans may have been [in 1776], they were nonetheless rebels. We may think that they were right without ... denying that they were repudiating the rule of law.'[3] Judges faced with a law they believe is appalling should resign rather than pretend it is unconstitutional; citizens should choose emigration or exile over private self-help. Unlike Hobbes, who insists that nothing the government does short of executing you could be worse than a lawless vacuum, Waldron's democratic liberalism acknowledges stronger moral limits, implied from the original social contract — but without claiming that it would solve anything to make these limits justiciable.

So Waldron's position is coherent, if not always palatable. However, Waldron does not explicitly set forth his own 'rule of recognition' for mapping the moral limits of the constitutional settlement, even though he acknowledges that such limits do exist. This vagueness is tantalising — especially from a positivist who praises the certainty that 'bright-line' rules offer. Waldron's depends heavily on an assumption that the legislature is a sufficiently accurate reflection of the views of one's fellow citizens that to resist it means disrespecting them. Playing with this assumption would raise many questions, which *The Dignity of Legislation* doesn't answer — yet which must be answered before the reader signs up to Waldron's social contract, and embraces its uncompromising rejection of constitutionalised rights and judicial activism.

It is unclear whether Waldron believes (full) allegiance is also owed to legislatures that are *not* equally representative of all (sane adult) citizens. If it is, why bother grounding legitimacy on consent? We'd obey anyway, just to prevent fighting in the streets. But if it is not — if legislative supremacism is conditional on the legislature meeting minimal democratic standards — the same problem re-emerges, because people will have conflicting private

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[3] Shirley Robin Letwin, 'Law and Liberty,' Fourth Annual John Bonython Lecture (Melbourne, 11 August 1987), Centre for Independent Studies.

interpretations on what these standards are and whether a legislature meets them. May Nelson Mandela, or Donald Woods, disobey a parliament elected by white South Africans only? What if citizens' genuine moral disagreements extend to such questions as whether 15-year-olds, convicted criminals, *Gästarbeiter* or mentally ill citizens may vote — and these disagreements run so deep that some do not agree that 'respecting my fellow citizens equally' is best served by obeying the laws enacted by the existing legislative process? What if dissenters believe the legislature is not adequately representative but also decide that, for the sake of public order, they will obey all of its enactments *except* those that discriminate against groups that are under- or unrepresented in the legislative process? Which kind of judgment is more consistent with Waldron's democratic positivism: *Baker v Carr*, in which the US Supreme Court held that legislators must represent equal numbers of voters, or *Ex rel McKinlay*, in which the High Court of Australia held that legislators may allow unequal electorates? Even if electorates must be in principle be equal, may they vary from the average by 20 or 25 per cent, or only by 10 or 5 per cent — or is strict mathematical equality required? What if the equally elected assembly is 'chaperoned' by an Upper House whose members are hereditary, or appointed, or elected from unequal constituencies? Would our allegiance to such a bicameral legislature vary according to whether the Upper House has an absolute veto or only a power to delay legislation?

These questions involve genuine disputes of principle which need to be settled by *law*, but which the *legislature* on its own cannot settle authoritatively. This is not just because individuals hold fundamentally conflicting views on them, but also because they have no reason to trust the legislature's determination enough to abide by it to their own cost, because of the legislators' obvious conflict of interest. Waldron's own example of a disagreement that needs legislation to settle it — over freedom to bequeath one's estate (pp 36–38) — can be distinguished. Although we may hold strong, even very intense, beliefs in the right to individuals to decide their own wills, or alternatively in the right of a deceased's dependants to receive support, we have no objective ground for claiming that the legislature's determination on the issue is less trustworthy than our own view, but we have a strong incentive to accept *some* uniform view. It is plainly otherwise if the legislature decides that people like myself cannot vote at all, or shall have votes of markedly less weight than those of other citizens, or are prohibited from criticising Cabinet officials. Even if I accept that normally it is better for everyone that my own moral judgments are subsumed by those the legislature makes on society's behalf, I have no reason to give trust or allegiance to a legislative decision that entrenches its members in power, or that shuts me out from seeking peaceful reforms from future legislatures.

Waldron rules out recourse to the courts to settle such disputes, in the hope that this will leave the legislature the only authoritative voice on what society's rules shall be. But he himself acknowledges that in extreme cases of abuse, a rational individual would not submit unconditionally to the legislature's decisions. Paradoxically, this could be *more* anarchic than a system of 'representation-reinforcing' judicial review: if the legislature is

unrepresentative and the courts refuse to intervene, private resistance is the only option remaining.

Apart from this central uncertainty about the limits of obligation when positivism clashes with democracy, I have six other questions about Waldron's argument. First, different avenues of 'counter-legislative' resistance are open. In Australia and the United States today, we equate it with judicial review (whether enforcing entrenched statutes or unenumerated 'fundamental values'), but in other times and places it involves civil disobedience (whether individual and passive, like Socrates or Thomas More, or collective and active, like those who toppled Marcos and Milosevic); international sanctions or intervention; or even executive dispensation (for which James II was deposed). Waldron's and Hobbes' objections do not apply equally to all of these forms. Hobbes' fear that 'vainglorious' George Speight-types might invoke 'justice' to mask their own personal ambitions as they mount a destabilising series of *coups d'état* is very different from modern conservatives' fear of an 'imperial judiciary'.

Indeed, far from endorsing uncritical 'awe' toward the 'Common Power' of the nation, today's legislative supremacists, like Robert Bork and Lino Graglia, prefer legislatures over courts for neo-federalist reasons: they want to preserve 'States' Rights', and they fear that courts enforcing vague standards of 'justice' will impose uniform national values upon local communities that don't want them. (This is ironic, given that judicial review began in *Marbury v Madison* as a result of an entrenched written Constitution, which in turn was a result of federalism.[4] However, the Swiss, and since 1993 the Belgians, have maintained decentralised federations without judicial review.) This is my second big question mark: the place of federalism, which, like bicameralism, should affect the presuppositions behind Waldron's theory but is not discussed. Does it detract from the dignity of legislation if courts must decide *which* legislature has the last word? Waldron's theory seems to assume a unicameral, unitary legislature elected on an equal franchise. Outside Scandinavia and Waldron's native New Zealand, few polities match this ideal type.

Third, Waldron observes that objections to parliamentary democracy based on paradoxes of voting (e.g. Arrow's) do not prove courts superior to legislatures, since judges too decide by majority: judicial review means only 'a difference of constituency, not ... of decision-method' (pp 128–29). But might the change of scale mean a change in character? Courts are small and collegial enough for judges to collaborate closely when writing their judgements; and judges, unlike legislators in a large assembly, cannot ambush their opponents

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[4] Professor Geoffrey Sawer, in *Modern Federalism* (Watts, 1969), claims that its role in adjudicating federal disputes — when a judgment against one legislature will be backed by another legislature — gave the US Supreme Court courage to strike down legislation. From this beginning, a mandate to protect the federal common market against protectionist barriers can easily expand into judicial solicitude for all minorities deemed inadequately represented in the legislature regulating them.

using clever parliamentary tactics.[5] Moreover, courts often strive to attain unanimity, or something close to it, on controversial judgements;[6] whereas legislatures rarely fear that contentious new Acts will lack legitimacy if carried by a single vote (e.g. the *Family Law Act* 1975 [Cth]) or a small handful (e.g. the *Habeas Corpus Act* 1679 [UK]). Another reason why majority voting has a stronger connection to legislatures than to courts is that, for legislators, votes have much greater weight relative to arguments. A judge's dissenting opinion has more influence, both legal and political, than a speech by an parliamentarian in the minority party. The great dissents of Holmes and Brandeis shaped US First Amendment law more than did the Supreme Court majorities of their day, but no one except historians cares much what opposition parliamentarians said while being outvoted, unless they were outstanding orators like Burke or Calhoun. A well-argued dissent may even change a judicial colleague's vote, whereas legislators are rarely persuaded by what is said on the floor. And legislators can make law even if they guillotine all debate, whereas courts that issue bare decisions without any *ratio* or *obiter* can hardly be said to be 'making law' (or, for traditionalists, 'declaring law') at all. So while Waldron is correct that the arbitrariness of voting affects courts as well as legislatures, voting by judges is less arbitrary — albeit also less representative.

Fourth, it is unclear where referenda fit between Waldron's democratic majoritarianism and his rejection of constitutional entrenchment.[7] This, again, challenges his central assumption that the legislature represents the judgments of one's fellow citizens on disputed political issues. Waldron does mention, briefly, 'legislation by the people (along the lines of a plebiscite or California-style initiative)' (p 163), but his context, rather than pitting direct against representative democracy, seems to be contrasting universal suffrage against aristocratic and mixed forms of government. Some parliamentary supremacists, notably Enoch Powell, have opposed referenda on principle. Waldron, however, acknowledges elsewhere that, because our fellow citizens 'have views on ... the desirability of referendums ... Respect for their political

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5 See for example *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at p 309, where Murphy J explicitly cast a 'second-preference vote' for Stephen and Mason JJ's reading of *Constitution* s 92, to help it gain a majority over the interpretation he most opposed.

6 See *Brown v Board of Education*, 347 US 483 (1954) (US Supreme Court voted 9–0 to invalidate school segregation); *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (High Court of Australia voted 6–1 to recognise Indigenous native title).

7 Referenda and entrenchment are not the same, although Australians tend to link the two because our *Constitution*, like those of most US states, is both entrenched and amendable by referendum. But the United States and Germany have entrenched Constitutions, without referenda; Britain's EEC membership was decided by referendum but is not entrenched. To complicate the matter, some laws — all provisions of the Swiss Constitution, or the new Australian constitutional preamble had it passed in 1999 — are enacted by referendum, and entrenched, but not judicially enforceable.

capacities demands that ... their opinions count.'[8] So it is legitimate, in a majoritarian positivist's eyes, to *hold* a referendum; it is just unclear what legal force a referendum can have. I understand Waldron's reluctance to see entrenched, even by referendum, a constitutional clause directing judges to invalidate (say) 'any fundamentally unjust law' — or, *a fortiori*, to hear the judges themselves find such a command 'implied' in the constitution's 'penumbras'. But what if a majority of voters agree to entrench an enforceable statute fixing the legislature's maximum term? True, the US Ninth Amendment gives imaginative judges all the textual basis they would need to find almost anything they like amidst the 'other [right]s retained by the people' — even if the people themselves vote otherwise in elections or referenda. Laws like this are not really 'legislation' in Waldron's sense, but slogans that invite judges to do moral philosophy with little connection to any past democratic decision. But contrast those entrenched sections of the New South Wales *Constitution Act* that specify the voting system, or protect judicial independence. These were enacted (in recent decades) by referendum; they can be amended (only) by referendum, and they are too detailed in wording and too procedural in scope to allow 'government by judiciary'. Why should laws like these not count as 'legislation' which deserves 'dignity', on the criteria of both democracy and legal certainty? Both the Ninth Amendment and the New South Wales provisions shift power away from the legislature. But the Ninth Amendment — enacted and amendable by super-majorities of legislators, and entrenching a vague standard — shifts that power 'upwards', to the judges, in both its process and its substance. The New South Wales *Constitution Act* by contrast shifts power 'downwards', to the same voters from whom the legislature derives its own claims to obedience.

Fifth, Waldron usefully explains — albeit in passing — why a conflict between majority and minority is resolved by selecting a coherent policy that someone has proposed (p 142), instead of cobbling together what Dworkin would call a 'patchwork statute'. Its practical advantage — recognised by the recent trend toward 'final-offer' or 'pendulum' bargaining in arbitration — is removing incentives to make ambit claims in the hope the final outcome will split the difference. But Waldron's argument that this constraint is implied by the very 'physics of consent' is, unfortunately, not followed in practice. Experience shows that a 'camel designed by a committee' has a better chance of getting selected, especially by a body *other than* the ordinary legislature with disciplined, long-term party numbers. The weird chimeras devised in 1998 by Australia's Constitutional Convention (ConCon), and by the Jenkins Commission on Britain's electoral system, show the depressing likelihood that lobby groups are wasting their time if they advocate some carefully researched model over a long period. The 'Turnbull Republic' model and the Single Transferable Vote were rejected, respectively, because these were too closely associated with the Republic Advisory Committee and the Liberal Democrat Party.

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[8] Waldron (1993) p 39.

Finally, Waldron's theory of democratic positivism is oddly cryptic about statutory interpretation. Normally it would be unfair to critique a relatively short book for *not* covering some major topic — except that Waldron himself devotes four pages (pp 25–28) to discussing a view he rejects. He disapproves the British courts' recent move to admit parliamentary debates as evidence of legislative intention.[9] Hobbes might disagree with him: 'not the letter (that is, every construction of it), but that which is according to the intention of the legislator, is the law', therefore a judge 'ought to have regard to the reason which moved his sovereign to make such law, that his sentence may be ... his sovereigns [sic] sentence; otherwise it is his own, and an unjust one'.[10] Literal interpretation gives judges too much leeway for imputing to the law-giver artificial meanings that were never intended, based solely on linguistic coincidence.[11]

But, while Waldron shares Hobbes' concern for legal certainty in the face of radical moral disagreement, he rejects Hobbes' preference for a single individual as sovereign; like Locke, he insists that the 'Supream [sic] Power' be a representative multi-member body. In Waldron's view, this commitment to parliamentary democracy rules out purposive interpretation, because the only definite evidence of any 'intention' shared by all (or a majority) of the members of a large, politically divided assembly is the words they voted to enact:

> Beyond the meaning embodied conventionally in the text of the statute that has been put before the House ... there is no state or condition corresponding to 'the intention of the legislature' to which anything else — such as what particular members ... said or thought or wrote ... could possibly provide a clue (p 27).

But this still doesn't tell us how judges should clarify vagueness or ambiguity within the text itself. Granted, uncertainties will arise more rarely, and survive a shorter time, in a legislative Act than an entrenched constitution. But the legislature's availability to swiftly close loopholes may be no help when disputes have already arisen. If there are conflicting clauses within the same legislative enactment, each party will press for the interpretation that favours its interests and there will be no agreement on the 'literal' meaning of (say)

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9 *Pepper v Hart* [1993] AC 593.

10 Thomas Hobbes, *Leviathan* (1651), Chapter XXVI ('Of Civil Laws'), § 7.

11 An additional justification for majority rule, one consistent with Waldron's doctrine, is that it provides the most easily met threshold that still ensures an organisation has a single, unitary will. Allowing minorities to decide — not just to initiate or investigate — would be unworkable, because two or more opposing factions could qualify. And requiring super-majorities also allows minorities to decide, albeit negatively. So if we want our organisation not just to move but to move promptly, rather than sluggishly, we will allow even a one-vote margin to prevail. This in turn prevents ultimate power shifting from the rule-making to the rule-interpreting authority, by making it easy for legislators to overturn judicial misreadings of what they enacted.

Florida's electoral regulations once it is known that Gore's ox will be gored by one interpretation, Bush's by another. Given Waldron's imperative concern that legislators *shall* decide, it seems crucial to have a more definite formula for determining with certainty what legislators *did* decide.

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