Constitutional Precommitment Revisited

János Kis

1. Introduction

International human rights adjudication raises the following problem. Often, the action judged by the Court to be in violation of the relevant international convention is authorized by national law.[1] By implication, the ruling condemns the very law as violating the Convention. Clearly, genuine commitment to respecting the Convention imposes a moral obligation on the state found in the wrong to change its law. Some argue, however, that that moral obligation should be provided with legal force. The suggestion is to grant international courts of human rights the power to make rulings with binding effects on the domestic legislative enactments. But, then, the question emerges whether allowing an international court whose members are not accountable to the national communities affected by its decisions to strike down domestic law is compatible with democratic self-government.

This question is not entirely new. It is the familiar question of judicial review raised to a higher level. If judicial review, as many argue, violates the principle of democratic self-government at the domestic level, it *a fortiori* violates that principle at the international level, too. So before considering the objection to judicial review in the form that is specific to the international level, it seems advisable to reconsider it in the form in which it applies to the domestic level. If one believes, as the author of this paper does, that international judicial review is not prohibited by the principle of democratic self-government, one has to begin by outlining a defense of domestic judicial review such that seems apt to be extended to the international level.

The defense I think satisfies best this desideratum is unfashionable these days. In an article as of twenty years ago, Stephen Holmes argued that the apparent conflict between democracy and judicially enforced constitutional constraints can be dispelled by way of showing that these are self-imposed disabilities of democratic communities.[2] But Jeremy Waldron deployed powerful arguments against this proposal,[3] and today the mainstream view seems to be that his criticism settled the issue definitively.

My paper aims to reopen the controversy. Section 2 will lay out the model of precommitment (the "Ulysses model") that Waldron takes to be canonical. According to this model, agent A has a reason for precommitting oneself in t_1 if he anticipates himself to be taken hold of, in t_2, by irresistible temptations or

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debilitating fears beclouding his judgment and defeating his will. Thus, precommitment is justified by a cognitive asymmetry between the agent's present state of mind (calm, lucid) and his anticipated state of mind at some future moment (troubled, acratic). A precommits oneself by way of authorizing another agent, B, to block his irrational conduct in t_2. A is confident that his decisions taken at t_1 are correct while those at t_2 are mistaken; he identifies himself with the former and disowns the latter. The power to disable oneself to act, at t_2, on the decisions he would make then, enhances his capacity to autonomy, since it allows A's enduring rational self to subject his momentary irrational selves to its rule. And, although by authorizing B to tie and untie him A submits to another agent's control, the increased capacity to autonomy is not bought at the cost of surrendering the exercise thereof in action: B's role is restricted to carrying out A's instruction.

Waldron argues that constitutional constraints enforced by judicial review are not a proper instance of the Ulysses model; they are therefore inconsistent with exercising autonomy in action. He makes two main objections to Holmes' proposal (to be spelled out in section 3): an argument from disagreement aiming to show that the cognitive asymmetry assumption fails to obtain, and an argument from independent judgment pointing out that the failure of the mandatory instruction assumption to apply undermines autonomy in action.

This paper will reconsider the idea of autonomy-compatible precommitment. I will argue that the Ulysses model is based on an abstract structure that admits of other specifications, too (section 4), some of which are capable to accommodate the fact of disagreement (section 5) and that of independent judgment (section 6). The revision of the precommitment idea will allow us to look at the problem of judicially enforced constitutional constraints with a fresh eye (section 7), and it will allow more. For, as we will see, the institution of judicial review is not alone to be disallowed by the Ulysses model: so is legislation by a representative assembly that Waldron wants to see as a case in collective autonomy or democratic self-government. Sections 4 to 6 will show how a more general model can defend the idea of representative government against the charge that it is incompatible with democratic self-government.[4] If their argument succeeds, the plausibility of the attempt to understand judicial review in the same terms will increase, too, or so I hope.

Self-government is an elusive ideal, so it may be helpful to begin by providing at least a rough outline of the way I understand it. A political community is self-governing if it satisfies two conditions. First, to borrow a formula from Ronald Dworkin, it must be the case that the citizens "rule their officials, in the final analysis, rather than *vice versa*."[5] Later in the paper, I will flesh out this abstract proposition. At this point, suffice it to say that the term "citizens" stands in this proposition for a collective agency. Individual citizens can share this property of self-government insofar as they are part of the citizenry that, as a whole, rules its officials. The second condition defines the part the community must assign to a citizen in order for that citizen to properly see herself as "a partner in the venture of collective self-government."[6] It holds that the laws of the

community and the social practices authorized by it must treat each citizen with equal concern and respect, both as participants of the collecting decisions and as participants of the group of individuals whose interests those decisions are meant to promote. Again, this is an abstract principle in need of interpretation. But its significance is not reducible to determining the moral status due to the members of the community. To the extent that someone is systematically discriminated against or is subjected to rights-violating treatment by the political decisions of his or her community, that person is not a partner in the collective venture of self-government: he or she is a mere subject of the rule by others. And to that extent the community, rather than being self-governing, splits into two groups one ruling the other. Thus, the distribution of burdens and benefits of government is not additional to but constitutive of collective self-government.

It is against this standard that I will assess the procedures that precommit a group of people to representative government and judicial review.

2. The Ulysses Model

Holmes' main point is this. A collection of individuals does not constitute a collective agency until they settle on some common decision procedure or other. One cannot reach substantive decisions if the decision procedure itself is up for grabs all the time. Thus, in order to enable future generations to cooperate, the constitution-makers must block them from revising easily the decision procedure adopted for common use.[7]

Waldron finds this argument misdirected. "Precommitment properly so-called" is something else than "procedural pre-decision," he insists. When a community settles on a decision procedure, its aim is not that of excluding particular decisions. Any decision permitted by the procedure will be a valid one, whatever its content. Precommitment, on the other hand, entails imposing on oneself a disability to adopt particular decisions or to act on them. Agents who precommit themselves in the proper sense of the term carry out a certain decision in t_1, in order to decrease the probability for them to carry out another decision in t_2.[8]

For a paradigm of precommitment "properly so-called," Waldron turns to Jon Elster's analysis of the adventure of Ulysses with the sirens. Ulysses wants to hear the song of the sirens, but he knows that enchanted by it he would be overwhelmed by a desire to swim to their island not caring about his certain death. So he orders his crew to tie him to the mast and instructs them not to release him from his bonds, however desperately he should beg them to do so, until they leave the sirens' island behind.

Ulysses precommits himself in the proper sense of the term, since he blocks himself, at t_1, from carrying out a particular act at t_2. His reason for doing so is provided by a cognitive asymmetry between his present state of mind enabling him to take and act on rational decisions and his anticipated state of irrationality. In the absence of a self-imposed constraint, he would lose his capacity for

autonomy: he would act in the grip of an irresistible temptation he disowns *ex ante* and would regret not having resisted to *ex post*, if by a miracle he would survive the adventure. So the constraint Ulysses imposes on himself enhances his autonomy in the capacity sense. But it threatens to undermine his autonomy as a property of his action. Ulysses would surrender the exercise of his autonomy in action if he authorized his men to decide whether and when to untie his bounds. But he gives them precise instructions, ordering them to act accordingly. The crew act in this story as mere means of his rational will. This is what makes this case of precommitment compatible with Ulysses' autonomy in action.

Holmes thinks that constitution-makers have good reasons for taking recourse to the method of precommitment even if the people whose future choice they bind are fully rational all the way down.[9] Waldron seems to disagree. He apparently sees no other reason for an agent to precommit oneself in the proper, disability-undertaking sense but the fact of cognitive asymmetry between his state at the time of devising his long-term plan and the state into which he foresees himself to get in the grip of irresistible temptations or debilitating fears. And so he argues that constitutional precommitment must respond to some such cognitive asymmetry at the collective level.

In fact, philosophers and political theorists tend to agree that political communities, even democratic ones, are vulnerable to assaults of irrationality such as mass hysteria or extreme temptation.[10] Like an individual in the grip of temptations or fears, a community may act, from time to time, against its own long-term, rational commitments. Anticipating such unwelcome possibilities, the constitution-makers can entrench basic principles into a foundational document and authorize Justices to strike down any legislative enactment they find to be in violation of this or that entrenched principle. In this way, they disable the legislature's ability to subvert, in a moment of panic or temptation, the community's long-term commitment to honor those principles.

This is the view of constitutional precommitment Waldron subjects to criticism.

3. Objections to the Constitutional Precommitment View

First of all, Waldron insists, occasional outbreaks of hysteria and the like cannot explain why the basic principles of collective action should be protected against being revised by a simple majority vote and why majority decisions should be reviewed for their conformity to the entrenched principles by a body of Justices. These are short-term phenomena, and so the temptation to pass laws betraying the community's commitment to basic principles could easily be handled with the help of some delaying procedure that would leave majority rule and legislative supremacy intact.

Furthermore, it is presumptuous for constitution-writers to assume that majorities will use their power to crush the basic rights of minorities, Waldron argues. He calls the anthropological conception underlying such a picture the

"predatory view of human nature." He recommends rejecting this view and assuming instead that citizens are prepared to deliberate in terms of justice and the common good.[11]

I will follow his recommendation throughout this paper, adding the *caveat* that the motivational assumptions must be understood to apply uniformly to all the relevant agents. Thus, if we assume citizens to be public-spirited, then we must assume officials to be no less public-spirited. I adopt these ideal motivational assumptions for two reasons. First, I hope to be able to show, contrary to Waldron, that even ideally motivated people have good reasons for precommitting themselves to judicially enforced constitutional constraints. Second, democratic self-government is a normative political idea, and, as John Rawls reminded us, the examination of normative political ideas must start out from the assumption that people are motivated by the principles intrinsic to those ideas. It is only when the "ideal theory" is complete that we are in a position to turn to more realistic cases covered by "nonideal theory."[12]

Waldron makes two further important objections, and these are the ones that I want to discuss in detail. Both are based on disanalogies between the Ulysses case and cases of collective political action. I will accept the disanalogies and argue against the conclusions Waldron draws from them.

The first objection is one from disagreement. Ulysses is one man, but a democratic community consists of many people and, therefore, it can be divided by conflicting views in ways Ulysses cannot. Good faith disagreements are pervasive and lasting phenomena of politics in any moderately complex society, Waldron argues.[13]

But the fact of good faith disagreement seems to involve fateful consequences for the precommitment conception. For Ulysses, assigning the power to bind his conduct to an external agency is a means to allow his rational, long-term plan to survive temporary "decisional pathologies."[14] The relation between an earlier, constitution-drafting group and a later group whose actions it limits is just a change in the distribution of views. There is no reason for identifying the constitution makers' majority opinion with the genuine opinion of the community, while judging the opinion of the majority in a later legislature to be inauthentic. And the same holds about the relation between the distribution of views in a Court and that in a legislature.

Second, in Ulysses' story, the crewmen, carrying out Ulysses' determinate instruction, act as if they were his externalized organs. Constitutionally entrenched principles are not, however, specific instructions but abstract statements that need judgment and interpretation on the part of the Justices when they apply them to controversial enactments. But, then, the Court cannot be seen to be an external organ of the legislature executing its democratically formed instructions. Call this the objection from independent judgment.

If Waldron is right then, presumably judicial review and democratic self-government are incompatible. Let me note, however, before challenging Waldron's position, that the same presumption will apply to the relationship of

democratic self-government and legislation by a representative assembly. Representatives are a minuscule subclass of the citizenry. The majority of citizens may disagree with a decision supported by the majority of representatives. It is unclear how that decision could be ascribed to the community as expressing its genuine opinions rather than just a minority view. Furthermore, the representatives are not supposed to take mandatory instructions from the electorate, but rather to act on their considered convictions. But then, again, it is unclear how precommitment to representative government can preserve the autonomy or self-governing character of the political community.

Rousseau notoriously held that it cannot. If a community abides by laws made by an assembly of representatives, it gives itself into servitude, he insisted.[15] While making an analogous claim with regard to judicial review, Waldron disagrees with Rousseau on legislation by an elected assembly. He thinks that representative democracy's best account is given in terms of the ideal of democratic self-government.[16] It seems, however, that his arguments from disagreement and independent judgment have implications favorable to Rousseau's claim. In order to meet the Rousseauian charge, we have to rethink the conception of precommitment starting from its very foundations.

4. The Abstract Structure of the Model and Alternative Specifications

Let us begin by uncovering the abstract structure underlying the Ulysses model in order to address, in the next step, the question whether that structure admits of alternative specifications capable of reconciling constitutional precommitment with democratic self-government.

The skeleton of the model includes a *subject of precommitment* (in Ulysses' case, an individual) confronted by a *coordination problem* (due, in this case, to the fact that Ulysses undertakes a project at t_1 unfolding over time so that Ulysses' acts at t_{1+n} are required to be consistent with the overall plan of action). The coordination problem is loaded by a *special difficulty* explaining why it has to be resolved by way of the subject's submitting to a disability (beclouded judgment/akrasia at t_2). Precommitment is supposed to secure ascendancy for those decisions of the subject that *correctly* respond to the reasons applying to him over his *mistaken* decisions. The subject identifies himself with the correct decisions while disowning the mistaken decisions (the first responding to his rational deliberations and the latter assailing him with irresistible force), and so by allowing the first to defeat the second, precommitment *enhances his capacity for autonomy*. At the same time, since it consists in authorizing a separate agent to tie and untie the subject, precommitment poses a *threat to the exercise of autonomy in action*. That threat can be neutralized, however, by way of the authorizer keeping the authorized agency under adequate *control* (in Ulysses' case, by way of subjecting the latter to mandatory instructions).

So much on the skeleton of the model. It consists of a subject of precommitment; a coordination problem; a difficulty calling for precommitment as part of

the solution to the coordination problem; evaluation of the alternative decisions as being (more or less) correct or mistaken; a set of appropriate decisions with which the subject identifies oneself as opposed to alternative decisions he wants to see defeated; precommitment securing ascendancy for the first over the latter and, in this way, enhancing the capacity for autonomy of the subject; authorizing a separate agency to tie and untie the subject and threatening, in this way, his autonomy in action; and, finally, a method empowering the authorizer to keep the recipient of authority under control, neutralizing the threat to autonomy.

I want to show that the specific features of the Ulysses model can vary while the skeleton remaining constant. In particular, the two assumptions Waldron takes to be essential for autonomy-compatible precommitment—those of *cognitive asymmetry* between rational and irrational states of the decision-maker and *mandatory instructions* as a method of control—can be dropped. Cognitive asymmetry plays a double role in the Ulysses model: it explains why the agent has to resort to precommitment and why, by precommitting himself, he allows his correct decisions with which he identifies himself to defeat the mistaken decisions he wants to disown. I will explore the possibility of replacing cognitive asymmetry with functional equivalents in both these roles, and examine the possibility of replacing mandatory instructions with some other method of control. For the aims of our discussion, I will call the Ulysses model a cognitive asymmetry/mandatory instructions model, and I will propose alternative models that flesh out the same skeleton in a different manner.

The model we are after applies to cases where the subject of precommitment is a collective agency. In such cases, the coordination problem is raised by the necessity for separate persons to live together in a society ordered by impersonal relationships. The general difficulty to which precommitment is supposed to respond arises from the fact that different individuals have conflicting interests and disagree on which interests deserve to be satisfied and how they should be weighed against each other.

As Holmes pointed out, conflicts and disagreements make some kind of collective decision procedure yield determinate outcomes binding for all necessary; the procedure must be entrenched against easy changes, for otherwise any decision could be challenged by those believing that they could have a better decision under some different procedure. Thus, people living in a society have a compelling reason for precommitting themselves to a particular decision procedure even if they are rational all the way down. It is by way of settling on some such procedure that they constitute themselves into a distinct collective agency.

It is conceivable to have alternative procedures that are equivalent to each other in the sense that the sets of decisions allowed by them cannot be ranked as better or worse. Suppose this is indeed the case. Then, the precommitment to a particular decision procedure would have nothing like submitting to a disability among its purposes: although each procedure would restrict the set of feasible decisions, it would not matter which decisions are in and which are out. Precommitment would boil down to what Waldron calls a mere "pre-decision."

I think, however, that although such cases are conceivable,[17] the relevant political decision procedures are not in fact equivalent. In the next section I will argue that representative government is more likely to allow correct decisions than government by direct popular vote. When a procedure is more likely to allow correct decisions than its feasible alternatives, I will speak about *epistemic asymmetry* between the alternative procedures.[18] The Ulysses model includes epistemic asymmetry, too: the procedure disabling the agent to act on his decision at t_2 allows the correct decision taken at t_1 to defeat the grossly mistaken decision expected to be taken at t_2, while its alternative allows the decision at t_2 to defeat the decision at t_1. In this model, however, the epistemic asymmetry between the alternative procedures is tied to the cognitive asymmetry between the states of mind of the agent at t_1 and t_2, respectively. What I will show in the next section is that alternative decision procedures can be epistemically asymmetrical in the absence of cognitive asymmetry. For the time being, let me just say that if epistemic asymmetry holds between alternative decision procedures, then the precommitment to the epistemically superior procedure is guided, among other things, by the aim of disabling the agent to adopt and/or to act on decisions that are not allowed by the epistemically superior procedure but would be allowed by an alternative—epistemically inferior—procedure. The aim of this kind of precommitment is not one of ruling out particular, substantively identified decisions (like that of swimming to the sirens' island) but that of excluding a set of decisions, whatever those should be, that are less likely to be correct than those open to the agent under the epistemically superior procedure.

But in the Ulysses case, the winning decision is not merely better than the one defeated by precommitment: it is the *genuine* decision, one met by Ulysses' enduring rational self and made to prevail against an *inauthentic* because irrational decision. And even assuming that one collective decision procedure yields better decisions than the other, there will be individuals who judge the decisions allowed by it mistaken or wrong. This seems to suggest that the better decision cannot be ascribed to the collective agency as its authentic decision as opposed to inauthentic decisions.

Consider, however, the nature of collective decisions. Once in possession of a decision procedure, a group of individuals is a collective entity capable of owning decisions as a whole. Those decisions are made in its name even if some or many of its members are not treated by the group as equals and, therefore, are denied a proper part in the collective entity owning the collective decision. The more members there are, the more radically they are denied a proper part in the decision-owning community, and the less the collective entity will qualify as a self-governing community. And vice versa, the closer a collective entity is to treating each of its members as equals, the closer it gets to the ideal of self-government (see section 1). Notice that the distinction is neutral toward the fact of disagreement. The self-governing status of a collective entity varies with the way its decisions treat its members but not with the scope of disagreements dividing it.

If self-government is a true value, then we have a reason for claiming that to the extent a collective entity is not self-governing, the decisions ascribable to it are not the community's authentic decisions, while the decisions of a self-governing community are its decisions in an authentic sense.

Now epistemic asymmetry matters for whether self-government obtains in two ways. It matters, first, for a purely procedural reason. Suppose a member of the collective entity who disagrees with a collective decision has good grounds for thinking that the procedure under which the decision has been adopted is epistemically inferior to a feasible procedure that would disallow it. Then, she is warranted in believing that the decision she is convinced is mistaken came into force in virtue of a majority bias in favor of a procedure likely to yield decisions that are mistaken but advantageous to a certain subgroup within the community, and this is a sufficient reason for her to think that the procedure in force fails to treat all members as equals.

Next, epistemic asymmetry matters in that it might affect a particular class of decisions, those determining the status of the members of the group. Suppose a member disagrees with the conception of equal membership on which the group as a whole came to settle. Then, if the controversial conception is adopted according to a procedure that is epistemically inferior to some feasible alternative procedure, the dissenter has good grounds for thinking that the conception she is convinced is wrong came into force in virtue of a majority bias in favor of it, and this is a sufficient reason for her to disown the procedure regulated by that conception and its outcomes. She has no such reason when the conception in question comes to be adopted in full compliance with a procedure at least as likely to yield correct decisions as its feasible alternatives, since then she has compelling evidence that her community aspires in good faith to treat all its members in accordance with the best conception of equal membership.

What I hope to have shown so far is that *if* epistemic asymmetry holds between alternative decision procedures, *then* the framers of a constitution for a future republic have a reason from self-government for precommitting the community to the epistemically superior procedure. We have now to consider whether the antecedent of the conditional can be established. Provided it can, we have an answer to Waldron's objection from disagreement. Next, we have to address the objection from independent judgment.

5. Facing the Objection from Disagreement

Section 4 ended with the conclusion that if the decision procedure in force in a community is at least as likely to yield correct decisions as its feasible alternatives then citizens have good higher-order reasons to consider that procedure as worthy of their support and compliance, whether or not the first-order reasons they have endorse particular decisions adopted under it.

But if people are divided by pervasive and protracted disagreements on whether the particular decisions they collectively adopt are correct or mistaken,

how could they agree on which decision procedure is more likely to yield correct decisions? My preliminary answer is that the question whether a decision procedure is likely to yield correct decisions admits of evidence other than the evidence related to the correctness of particular decisions.[19] This section will explore such content-independent evidence that counts in favor of the claim that representative government is epistemically superior to government by direct popular vote.

Few think the opposite to be the case, but Rousseau thought so. He insisted legislation by direct popular vote to be the best collective decision procedure from an epistemic point of view. If citizens cast their ballot in an appropriate state of mind, he maintained, the majority vote will not merely carry the day; it will also provide unmistakable evidence for its own correctness. He was somewhat confused on why legislation by direct popular vote is the method most likely to reach correct decisions. But two elegant arguments are often cited in favor of his theory. Both are discussed by Waldron, albeit in the context of representative government rather than government by direct popular vote.

The first is Condorcet's celebrated jury theorem. Here is how it goes. Suppose one has to choose between two options, A and B, A being the correct choice. If the choice is taken by some random method (by tossing a coin, for example), the probability of A being chosen equals 0.5. Intelligent choices are likely to be at least slightly better. So if the choice is taken by way of a vote, the probability of each voter choosing A is at least slightly greater than 0.5. If so, and if the collective choice is taken by way of majority vote, the probability of the choice being correct approaches 1.0 as the size of the voting group increases.

The other epistemic argument discussed by Waldron originates with Aristotle's *Politics*. It refers to a feature of the process of deliberation preceding the vote, insisting that the larger the deliberating group, the greater the diversity of perspectives that the participants bring into the debate and the greater the likelihood, other things being equal, that a well-considered collective decision will be adopted.[20]

The two arguments concur to support the claim that individual citizens—wise and learned as they should be—have good epistemic reasons for accepting the authority of collective decisions, provided that the decision-making group is large enough.

It is but a small step from here to Rousseau's claim. If the probability of meeting correct decisions increases with the size of the decision-making body then the largest possible decision-making body seems to be likely to take the best collective decisions. Legislation by the entire citizenry is the most inclusive decision procedure compatible with self-government, since more inclusive procedures would grant a vote to people who are not themselves members of the community governed by the law. Therefore, so the inference goes, legislation by direct popular vote seems to be that form of self-government under which the chances for the collective decision to be correct are the highest.

I think the conclusion is false. The mistake in the argument leading to it consists, I believe, in both the Condorcet theorem and the Aristotelian argument resting on a hidden (and wrong) empirical assumption.

Consider Condorcet's theorem. Its outcome hinges on the assumption that as the size of the jury increases, the probability for a randomly selected jury member to vote correctly remains fixed above 0.5. The accuracy of a vote depends, however, on how well informed the voter is, and the larger the electoral population, the weaker the interest of an average voter to become sufficiently well informed. Information has value and it has costs. As to its costs: collecting and processing information takes time and other scarce resources. Public affairs compete for the attention of people with their private projects and responsibilities as well as their professional interests. The costs of information are non-negligible.

The value of a piece of information, however, becomes next to negligible as the size of the voting population increases. This is because such value depends on the difference the better information makes to the accuracy of the collective decision. The impact of a piece of information collected by an individual voter on the accuracy of the collective decision is a product of two probabilities: of the probability that the better informed individual will vote correctly, and of the probability that her vote will decide the outcome of the ballot. As the voting population increases, the latter value shrinks to the neighborhood of zero, neutralizing the impact of information on the quality of the individual vote.

The upshot is that individual voters are rational to remain relatively ignorant on political issues.[21] Individually rational ignorance need not be collectively irrational: the resulting misjudgments might cancel out each other. But this is not to be expected if ignorance leads to systematic distortions in the perception of collective decision problems.

The greater the complexity of an issue to be decided, the more information needs to be collected and processed in order to meet a correct decision, and the more serious the danger that the voters' judgment will not be just unreliable but subject to some systematic distortion. For a well-known example, think of the phenomenon called fiscal illusion. When government revenues are unobserved or not fully observed by taxpaying citizens, public services are perceived to be less expensive than they actually are. Since some or all taxpayers benefit from government expenditures the costs of which tend to be systematically underestimated, the public's demand for government expenditures grows greater than it would if each citizen were to balance the value of the public services against their actual costs.[22]

One might object that this is, perhaps, true about issues of policy but not about issues of principle. The latter are moral issues, and moral judgment requires no expertise or special information: the lights and the knowledge of any reasonable citizen are sufficient to form considered convictions on them. There are no epistemic reasons why the question of capital punishment, gay marriage or affirmative action, for instance, would not best be decided by the citizens in popular referenda.

This argument makes perfect sense in the domain of personal morality where the interacting people have the opportunity for acquiring shared experience. But it needs qualification at the level of issues raised by political morality. In some cases, those issues involve judgment on complex social mechanisms. For example, a well-founded answer to questions of affirmative action needs understanding of the way inequality is systematically reproduced over time even in the absence of practices of exclusion. In other cases, what is required is to understand interests of socially distant people whose worldviews, ways of life, experiences, or situation are alien to one. In order to come to agree that gay and lesbian people have a legitimate claim to have access to the institution of marriage, one must get acquainted with what their sexual orientation means for them and how it shapes their partnerships.

Even people motivated by a desire to be impartial toward their fellow citizens are open to spontaneous cognitive biases. We perceive each other's interests through the lenses of our own culture and experience. The greater the social and cultural distance between two groups, the more information their members need in order to overcome those biases and to avoid forming systematically distorted views on one another's interests.[23]

This is not to turn against the great Enlightenment idea that moral truth is fully accessible to ordinary human reason. There are no complexities of political morality that a reasonable citizen could not comprehend if sufficiently informed. And it is plausible to assume that in the long run the requisite information gets through. But the long run might be very long, and political decisions must be made in the short term.

It is, thus, of significance that the complexity of the political issues, whether of policy or of principle, heightens the informational requirements for adequate decisions, and insufficient information has a tendency to give rise to systematically distorted judgments in both domains.

And it is of significance that since the value of information decreases with the rise of the voting population, while the cost of information remains constant, the voter's judgments on complex issues of policy and of principle as well are often open to systematic distortions. Therefore, the tacit assumption on which Condorcet's theorem rests does not survive the growth of the jury size beyond a certain limit.

A hidden assumption lurks in the background of the Aristotelian argument, too. Public deliberation needs structure. It needs rules to determine what counts as a proposal to be decided and who is eligible to submit it; rules to determine the steps and stages of the discussion, the various forums a proposal must pass before it comes to the final vote; it needs rules to determine whether the proposal in question successfully passed a particular stage, and to define the order in which the different stages must follow each other; it needs deadlines, it needs voting procedures, and so on. This is a point emphatically stressed by Waldron with regard to legislation by a representative assembly.[24]

The tacit assumption behind the Aristotelian argument holds that the capacity of a deliberating group to conduct well-structured debates remains fixed as the

size of the group increases. This assumption is wrong, however. The conditions become less and less favorable for structured debate once the size of the deliberating group leaves the dimensions of democratic legislatures behind. A community of millions is simply too large for conducting any public debates other than informal and open-ended.

This is not to deny that public deliberation in which each citizen has unconditional and equal right to participate is of supreme epistemic importance. The debates conducted in an assembly of representatives are not separated by a Chinese wall from public deliberation at large. Rather, representative government institutes a back-and-forth movement between large-scale public deliberation and the debates conducted by an assembly of representatives, to bring this combined process to a conclusion by way of a legislative act of the assembly. So the question is not, which of the two groups—the citizenry or the assembly of representatives—should be trusted to possess a greater diversity of information. It rather asks which of the two should be trusted to draw more efficiently on the same input and to translate it into a correct decision. In sum, representative government institutes better structured deliberative processes than government by direct popular vote.

Furthermore, the representatives are more likely to be adequately informed than ordinary citizens. Consider first the costs–value balance of information. In the case of a representative, not unlike in that of an ordinary citizen, public affairs compete for the agent's attention with his private projects and responsibilities. But, in the case of ordinary citizens, they compete with the requirements of their professional activities, too. They are, on the other hand, at the heart of the vocation of representatives whose job is precisely that of dealing with public affairs. Thus, the opportunity costs of inquiring into controversial political issues are significantly smaller for a representative assembly than they are for the citizenry called to the ballot box. And so are the direct costs. Representatives can buy information and expert advice with the taxpayers' money, while the taxpayers themselves have to cover similar expenses from their own pocket.

As to the value of information: it is greater for a representative than it is for an ordinary citizen. While the chances that a citizen's enlightened contribution to a political decision makes a difference are negligible, they are realistic in the case of a representative.[25] Other things being equal, a randomly selected representative is likely to get hold of much more politically relevant information than a randomly selected citizen could be expected to possess.

It deserves separate mentioning that legislation by a representative assembly is better than legislation by direct popular vote at correcting spontaneous cognitive biases, too. Representatives have a special incentive to listen to the voice of distant groups carefully, an incentive unavailable to ordinary citizens. Citizens qua citizens possess an unconditional right to participate in popular ballots, while in a democracy nobody has an unconditional right to be a representative. One must run for a seat in the legislature and win the contest in order to obtain the right to participate in its sessions, including those in which the vote is conducted. The

requirement to undo their competitors in the number of electoral votes they are capable of gaining provides legislative majorities with a motive to extend their horizon beyond their natural constituencies.

True, gaining and preserving the support of a social group takes costs, and those costs increase with social and cultural distance. Even so, the key role elections play in the succession to office provides marginal groups with special opportunity to make their voice heard: an opportunity they would not have in a direct democracy. The competitive nature of representative government helps to offset, at least to some degree, the distorting effects of social and cultural distance on the way the conflicts of interests are perceived. We can, thus, conclude that a representative assembly is more likely to pool adequate information for dealing not only with complex issues but also with issues requiring impartial judgment.

6. Facing the Objection from Independent Judgment

If the argument presented in the previous two sections holds, the revised model of precommitment is safe against the disagreement objection. But the same characteristics that allow it to fend off that objection seem to make it vulnerable to the objection from independent judgment. We separated the assumption of epistemic asymmetry between alternative decision procedures from the assumption of cognitive asymmetry between different states of the same agent. And we found that the epistemic superiority of a procedure assigning the authority to decide to a distinct agency rests on the recipient of authority being put in an institutional position more favorable to making accurate judgments than the position in which the authorizer finds oneself. If so, then denying the recipient the freedom of acting on independent judgment would undermine the point of the authorization. Representatives, for example, are supposed to vote on the basis of their conviction and conscience. This entails a disability for the electorate to give them mandatory instructions. But, then, precommitment to representative government risks incompatibility with the citizenry's exercising autonomy in collective action.

One could try to meet this objection by showing that treating everybody as equals is not just a necessary but also a sufficient condition for collective self-government to obtain.[26] Here is how the argument could go. True, precommitment to legislation by an assembly of representatives would disable citizens to give mandatory instructions to their representatives if they were in a position to do so in the first place. But they are not. The situation of citizens is radically different from that of Ulysses. When Ulysses decides on whether and how to instruct his crew, the decision is his and his alone. Citizens, however, take political decisions together with their fellow citizens. And, as we have seen, the probability for an individual citizen's vote to be decisive is next to zero. Therefore, no individual citizen can give mandatory instructions to his or her representative in the first place, except if, in violation of political equality, he is granted a supervote, capable of overruling the vote of the others. This inability is due to a property of political

decisions that representative government shares with government by direct popular vote. Consequently, if collective self-government is possible at all, the authorization of the representatives to follow their convictions and conscience can make no difference to it—except if their decisions violate the requirements of equal membership. Equal membership must be both necessary and sufficient for collective self-government to obtain; the assignment of legislative power to representatives having the freedom to act on their considered convictions and conscience making no difference for the self-governing character of the community.

There is a fallacy in this argument, or so it seems to me. It will reveal itself if we compare a case when citizens vote directly, say, on a policy proposal *p*, with one when they elect representatives to vote on *p*. Consider the case of direct popular vote first, and suppose A had one vote like everybody else. She voted in favor of *p*, and as it turned out, *p* won by a majority of 1000. Her vote had no impact whatsoever on the outcome of the decision on *p*: whichever of the options open to her she would have chosen (voting for or against *p*, staying home), the outcome of the collective decision would have been the same. But she intended her vote to count in favor of *p*; this is why she marked "yes" rather than "no" on the ballot sheet. So the question is, whether her intention matters, and if it does, whether it matters in a way that makes legislation by representatives free to vote on their considered convictions problematic for democratic self-government

Apparently it does not matter, and this is true about all the voters, not just about those who, like A, voted in favor of *p*. But if the voters' intention that their vote counts in a certain way does not matter, then the voting system can be recast at no detriment to equal membership, at least if no inequality-confirming bias is introduced by the change. Here is a new rule that would be impeccably equality-preserving *provided that* the voter's intention does not matter. At the end of the day, votes are fed into a machine. Following a random algorithm the outcome of which the voters cannot anticipate, the machine chooses from time to time to reverse the decisions expressed on the ballot sheet: it counts the "yes" votes with the "no" votes and vice versa. At no insult to any citizens' equal standing, the outcome of the collective decision comes to be the opposite of what it was meant to be.

But of course the citizens would be justified in feeling insulted by such a perverse aggregation rule. If the voting machine is free to disregard their instruction to count their votes as they intended, they are not treated by the procedure as persons whose revealed intention carries authority with it but as mere means of an impersonal mechanism. In order for the voting procedure to treat voters as equal citizens, it must treat them as autonomous beings whose voting intention must be respected, and it does so by satisfying a principle called *positive responsiveness*.[27]

Positive responsiveness is a weak but morally significant requirement that condemns aggregation rules like the one mentioned in the above example. It insists that a system of voting is not acceptable unless there is a positive relationship between each single ballot and the change it makes to the probability of the outcome of the vote: that change must never be negatively related to the intention expressed by the mark made on the ballot sheet. When a particular issue is decided

by direct popular vote, positive responsiveness makes sure that each voter's intention to affect the outcome in a certain way is taken seriously by the decision procedure.

Positive responsiveness continues to hold under representative government between electoral intentions expressed by marks on the ballot sheets and the way those intentions are treated by the aggregation rules of the electoral system. But citizens form their intention to support a particular candidate under the guidance of a deeper intention related to the nature of the government they want to have. Suppose the only issue at stake at an election is whether *p* should be implemented or not. Now the citizens do not vote directly on *p*. They vote on two party lists, C and D, party C running on the platform that *p* should be adopted if and only if condition *r* will obtain in the first year of the new legislature, and should not be adopted in the absence of *r*, while D runs on the platform that *p* should be adopted under all foreseeable conditions. Both candidates take sides honestly convinced that their platform is the correct one. Since A agrees with D's position, she casts her vote for D. She does this, obviously, with the intention of increasing the probability of *p* getting adopted.

This intention does not appear on the ballot sheet. It may be indeterminate or inscrutable. But this is only a technical problem. There is a problem of principle as well: even if the deeper intention can be discovered, it has no mandatory force. The mark put by A on the ballot sheet binds the electoral committee to count A's vote in a certain way. It does not bind the candidates on D's list to vote in the legislature, if elected, in accordance with the hopes and expectations that brought A to vote as she did. Suppose the legislative group of D comes honestly to believe after the election that *p* should not be implemented, whatever the conditions. Then, A's vote could make only one impact, that of diminishing the probability for *p*—the outcome she intended to promote by casting her vote in favor of D—to be implemented.

It is in fact the case that the chances for an individual citizen's vote to be decisive are next to zero anyway. But in a self-governing republic citizens are members of a community that, as a whole, "rules its officials." If positive responsiveness fails to obtain, then either it is the case that a particular citizen is not a full and equal member of the community, or it is the case that the community is not self-governing because it fails to rule its officials—at least in the way Ulysses rules his crewmen, by giving mandatory instructions to them. Since representative government breaks the chain of positive responsiveness, the mandatory instructions method of self-government gets lost. Either it is replaced by some functional equivalent compatible with the representatives' freedom to follow their own convictions, or the precommitment to legislation by a representative assembly undermines self-government.

Now mandatory instructions have two relevant components: binding force and future-directedness. These cannot be jointly compatible with the representatives' freedom to act on their considered convictions. One of them must be replaced by a "free mandate"-consistent component.

Since the functional equivalent we are after must have some binding implications, it is future-directedness that must go. Rather than casting the authorization in the form of prospective commands on what the recipient of authority should do, the authorizer must enable the recipient to carry out certain types of acts and intervene to correct retroactively what the recipient of authority does. Representatives should not be subjected to *ex ante* instructions but to *ex post* intervention. In other words, representatives are under the control of the represented if the latter are capable of changing the course of government by expressing collective disagreement with it and a desire for change. Such intervention can admit of two different forms: *overruling the law* adopted by the representative assembly (or the refusal of the assembly to make a certain law the citizens want to have), or *removing the legislator*. Both methods can be used in conformity with precommitment to representative government provided that they proceed within constraints. Most democratic constitutions completely ignore the institution of national popular initiative, and those that know it tend to restrict its scope and to make its use very difficult. And no democratic constitution provides for recalling representatives between two elections.

Although the same constitution may have room for both methods, removing the legislator is clearly the dominant instrument of *ex post* citizens' control. First, it needs no additional procedure beyond the elections that no representative democracy can dispense with anyway: authorizing the next body of representatives and removing some of the incumbents are the two sides of the same coin. Second, elections being held with periodic regularity, no *ad hoc* acts are needed to initiate them. Third, while popular initiatives overrule specific legislative decisions, the removal of the previous legislative majority has no authoritative effects on the law's content. No past act of the legislature is invalidated by it, nor does it convey binding directives on which law should be changed or how. Electoral decisions leave room for the newly elected representatives for interpreting the lessons of the vote in the light of their own convictions concerning justice and the common good.

Nevertheless, elections give guidance to the newly authorized legislature. Legislative majorities do their job under a continuous threat of losing their majority position at the next election. This threat is a most important regulator of democratic politics, giving significance to the voters' deeper intentions.

Elections do not stand alone as sources of information on what representatives are expected to do. Between two elections, a mass of messages meant to affect their conduct are conveyed by the press, by watchdog groups, by human rights and civil liberties organizations, by single issue movements, and through various different forums where individual citizens can voice their demands and opinions directly by participating in street demonstrations, mailing campaigns, or town hall meetings, by wearing bumper stickers, by visiting interactive websites, and so on.

Theories of deliberative democracy focus on the informal communicative processes going on in these forums, describing these as reasoned debates on

issues of common concern, aiming to clarify the nature of disagreements, to uncover the relevant facts and considerations, and to confront arguments with counterarguments. Ironically, while tending to overestimate the capacity of entire citizenries to give rigorous argumentative structure to their discussions, they tend at the same time to underestimate a different—strategic—role public deliberation plays in providing representatives with simuli to act in certain ways. When citizens take sides in controversial political issues they do not always make new points, and they very rarely propose new arguments. And even when they do, they do something more. They send signals to the participants of the competition for elected office on how they should adjust their conduct if they want to be reelected.[28]

Thus, periodic elections are but the legally binding core of a web of practices through which citizens can hold their representatives to accounts. *Accountability* to the citizens is the property of representatives that makes their freedom to act on their considered convictions compatible with democratic self-government. Citizenries can be said to "rule their officials, in the final analysis, rather than vice versa," as Dworkin put it, if the officials do not merely derive their authority to govern from the citizens but are also accountable to the latter.

To take stock: this section began by asking the question whether citizens can co-own collective decisions met by representatives merely in virtue of their being treated as equals by those decisions. The answer I tried to defend is that, in order for ordinary citizens to be "partners in a venture of collective self-government," it is not sufficient that the requirements of equal membership obtain in their community; it is also necessary for them to be equal members of a community that, as a whole, holds its representatives accountable.

7. Judicial Review

We are now in possession of a model of precommitment that is more general than the cognitive asymmetry/mandatory instructions model and entails both the latter and the model applying to representative government as special instances. It is an epistemic asymmetry/control model. Control is specified in the case of representative government as accountability.

Accountability is a great democratic virtue. It permits the citizenry to remain sovereign while paying obedience to rules and commands issued by a representative assembly. Besides, it has epistemic benefits. It allows the citizens to enjoy the advantages of more accurate collective decisions than those they could meet directly. Some of those decisions affect matters of principle, and the increased likelihood of their being correct enhances the self-governing character of the community by getting closer to the ideal of treating each citizen as an equal. And accountability involves further improvements in the quality of those decisions, since—as we had the occasion to see—having more information on complex issues is a competitive advantage in the race for elected office.

At the same time, accountability has various different weaknesses. For reasons of space, I limit myself to the discussion of one of these: accountability has a built-in tendency to give rise to perverse effects.[29] This is because it makes the better informed responsive to the expected electoral behavior of the less well informed. A group of voters in a position to change the outcome of an election sometimes believe a certain decision to be bad or wrong while a representative whose fate hinges on their votes may not simply disagree but have good grounds for thinking that the disagreement is explained by unequal information. It is, thus, quite possible for representatives to be confronted, from time to time, by a choice between losing the next election and deferring to electoral beliefs they cannot endorse in good faith.

If a representative nourishes "predatory" attitudes, he will have no scruples about deferring to mistaken electoral beliefs. But we can stick to the uncompromising rejection of the "predatory view" and yet agree that, sometimes, a group of representatives forming a parliamentary party may conclude that deferring to mistaken beliefs of their constituency is preferable to an electoral defeat, thinking that the harm from deference is outweighed by the foreseeable harm the rival party would cause to the community. Such judgments may be due to self-deception. But, at least on some occasions, they are not.[30] When they are not, the party in question is morally permitted to defer to electoral beliefs and expectations it has good grounds for thinking to be mistaken.

Unless the aggregate loss from inaccuracy of a decision is very great, occasional mistakes of policy need not be of moral concern. But the issues of principle are different. When a mistake affects the rights of even a single citizen, then that citizen has a very serious complaint as an individual, a complaint with a force to override the incidental collective benefits from the mistaken decision, and because collective self-government depends on each citizen being treated as an equal, the self-governing character of the community is to that extent compromised.

Whether some acts authorized by a legislative decision violate rights entailed by equal membership is often a matter of disagreement, and a deep one at that. People who judge an act to be rights-violating tend to think it is *obviously* so. This conviction makes them suspect that the decision in question has been met in deference to views the legislators themselves must consider to be incorrect. The suspicion is not without grounds, since legislators in fact have incentives to meet such decisions from time to time. And it gives rise to a special charge of unfairness, distinct from the one that declares a legislative decision unjust on its merits. It puts the blame for unjust decisions on the unfairness of the very democratic process.

Potential victims have a standing to require assurances that their status as equals is not offended merely in virtue of the fact that the legislative majority defers to the views of a voters' group playing a strategic role in the electoral contest (or in virtue of other undesirable side-effects of accountability that I have no room to discuss in this paper). The aspiration to institute a self-governing community gives good reasons to the framers of the constitution to provide that assurance.[31]

At this stage, it is the legislator who comes to be constrained by precommitment, again not to prevent future irrationality, but rather to prevent some specific pathologies of competitive politics from undermining justice and rights which lie at the foundations of democratic self-government. According to Waldron, "to embody basic principles in an entrenched document" is to adopt an attitude of "self-assurance combined with mistrust" toward others: "self-assurance in the conviction that the proposed principle is true," and "mistrust implicit in the view that any alternative proposal is obviously wrong-headed."[32] The model of precommitment I am proposing has nothing to do with such attitudes. Its account is based on a very different idea: that the competitive character of politics under a representative government gives reason, from time to time, for legislative majorities to make unfair decisions, even if they are firmly committed to the ideal of fairness and equality.

Furthermore, Waldron insists that the proposal to shift decisions about the conception and revision of basic principles from the legislature to the courtroom is motivated by the thought that "a handful of wise, learned, and virtuous men and women can alone be trusted to take seriously the great issues of principle."[33] The model outlined in this section proposes to trust judicial review for very different reasons.

First, being made unaccountable to the legislature, the Justices are free from institutional incentives to defer to the views of the majority of representatives they have good grounds for thinking to be mistaken for reasons mentioned above. And, second, unlike legislatures, Courts are accessible to individual plaintiffs who claim that a particular enactment violates a constitutionally entrenched principle by causing a setback to their interests. Weak as their group might be politically, such people may have a standing for litigation as individuals. Furthermore, as litigants, they have a procedurally guaranteed opportunity to explain their claim in detail, to argue for it, to answer objections, and to do this with the help of legal and perhaps other experts. And the judicial procedure imposes standards on the deliberation in Court that are incomparably more demanding than those of legislative debates.

Justices lack the epistemic advantages of accountability. But they are free of its epistemic disadvantages. And moreover, they have other epistemic advantages, unavailable to representatives.

Finally, judicial review is not meant as a replacement of legislation. It consists in an examination of some of the laws already passed. It comes into play when a complaint is leveled against a particular enactment calling precisely for those epistemic advantages Justices enjoy as compared to legislators.

The idea is not that the Justices have direct access to the truth on matters related to equal membership. It is rather that representative government subjected to judicial review is more likely to avoid treating individuals and minorities in violation of their equal standing than straightforward representative government. If this is true, then precommitting legislation to judicial review enhances the self-governing capacities of the community.

But doesn't it at the same time undermine the exercise of those capacities in collective action? There are good reasons for raising this question, since the Justices are deliberately insulated from the electoral process, and they are made unaccountable to the citizenry whether directly or through its representatives. Here is why I think judicial review is not self-government-undermining.

First of all, although not accountable to the citizens, Justices are accessible to them in a way legislatures are not. Individual members of a minority cannot appeal to the legislature against laws they think violate their rights, but they can appeal to a court. Furthermore, Justices do not constitute an aristocratic body. True, they are not elected by the citizens, but neither do they rise to their position by way of obtaining a degree in the Academy of Natural Law. Rather, they are appointed by officials who in their turn are elected by and receive their authority to appoint other officials, including the Justices, from the citizenry. Their authority has an impeccably democratic genealogy.

Finally, and most importantly, that Justices are not accountable does not mean that their decisions are beyond democratic control altogether. In the previous section, I distinguished two methods of control, both compatible with independent judgment: removing the official and overruling the official decisions. The method of overruling, as I said there, plays next to no role in the relationship between the citizenry and the assembly of representatives. But it might play a key role in the relationship between the assembly and the Court where accountability on its part has no proper role to play.

Constitutions are open to revision, and depending on how stringent the rules of amendment are, representatives have a certain capacity to overrule a controversial judicial decision by passing a constitutional amendment. Given the point of precommitment to entrenched principles and judicial review, building a sufficiently large coalition for amending a provision of the constitution must be quite difficult. But it need not nor should it be as difficult as to exclude the possibility for a broad and enduring legislative coalition, formed in response to a strong and sustained popular opposition to a judicial verdict, to change the constitutional provision on which that verdict rests.

Since even under an ideally calibrated amendment procedure, such reversals of judicial verdicts would not happen often, one may doubt whether the method of control at the legislature's disposal is sufficient to prevent the authorization of the Justices to degenerate into a surrendering of democratic self-government. I want to make two short comments on such doubts.

First, legislators can make law upon their own initiative; the vast legal material produced by them covers all walks of life, and the reasons they are allowed to take guidance from when making legislative decisions are restricted by the constitution only. On the other hand, constitutional Justices need external initiative to make binding decisions; their rulings apply to already existing laws and to a very small part of the body of laws at that, the only permissible reason for them to strike down a legal enactment being that it violates a constitutional constraint. Second, the exceptional and strictly regulated judicial interference with legislative deci-

sions plays the role of an extremely important assurance that individual rights will not be violated as a result of procedural unfairness. These considerations give concurrent support to the claim that, in order to be adequate, the means at hand to the legislature need and should not enable the legislature to overrule judicial decision very often.

There is a last consideration. The rare occasions on which the legislature is able to overrule judicial decisions are not isolated episodes. Legislatures have a softer method at hand to try to bend the outcomes of judicial decisions toward their conception. Typically, an ordinary legislative majority is not sufficient to amend the constitution, nor should it be, but it is sufficient to impose on the Court a dialogue about the scope and the meaning of its decision. Suppose the Court strikes down a law the legislative majority believes to be accurate. What the latter may do in the absence of a constitution-amending coalition is to revise the invalidated law in the hope of allaying the constitutional worries of the majority of the Justices, preserving at the same time what the representatives deem important in the dismissed piece of legislation. Sooner or later, the issue may be brought back to the Court. Then either a new judicial majority emerges with some members of the previous majority coming to agree that at least in its revised version the law is constitutional, or the law is declared unconstitutional again. If it is declared unconstitutional then, again, either a new legislative majority emerges, with some members of the previous majority coming to accept the judicial ruling as correct, or the legislature will try its hands for a second time. The exchange may continue indefinitely, but it also may lead to a slow build-up of a constitution-amending coalition, which then comes to overturning the judicial decision.

8. Conclusion

This article proposed an alternative to the cognitive asymmetry/mandatory instructions model of precommitment. The revised model explains why precommitment can enhance the capacity of a community for self-government in terms of the unequal likelihood of alternative decision procedures to yield correct decisions, and it explains in the general terms of control how precommitment can be compatible with its exercising self-government in practice. Interpreted in the terms of this general model, cognitive asymmetry appears to be a special case of epistemic asymmetry, and giving mandatory instructions appears to be a special case of holding the addressee under control. So the Ulysses model represents just one version of the epistemic asymmetry/control model. Political decisions procedures such as representative legislation or judicial review were shown to belong to a different version.

The general model establishes the democratic credentials of representative government by showing that legislation by a representative assembly is more likely to meet correct decisions, both on matters of policy and of principle, than

legislation by direct popular vote and, that, the institutions of representative government enable the citizens to hold the representatives accountable. As applied to representative government, it is specified as an epistemic asymmetry/accountability model.

Similarly, the general model justifies constitutional entrenchment of the basic principles of political morality and judicial review by the greater likelihood of representative government to avoid equality-violating treatment of individuals and groups when it is disabled in making final decisions on matters of justice and rights, and it argues that greater accuracy does not come at the price of surrendering democratic self-government because, when there is massive and enduring popular resistance to a judicial verdict, the legislature may be able to overrule it. As applied to judicial review, the general model is specified as an epistemic asymmetry/overruling model.

Our argument proceeded within the constraints of the motivational assumptions of ideal theory. Since Waldron argued from the same assumptions, the discussion of his objections can stop at this point. But of course this is not the end of the story. The question whether judicial review delivers in fact better decisions on matters of justice and rights is ultimately an empirical one. The hypothesis needs to be tested systematically, over long time series and across a large number of democratic states. Before coming to such a test, the motivational assumptions of ideal theory must be relaxed so that our account of constitutional democracy comes closer to the real world.

But even at the present stage of our argument, we can say something on the opening question of this article. We asked whether international judicial review can be shown to be compatible with democratic self-government. If the main theses of my paper hold, we have a promising strategy at hand to defend the positive answer. Here is how it would work.

In the first step, we ascertain that "with respect to the formulation, application, and enforcement of human rights norms, international legal institutions are preferable to domestic institutions, because states are likely to be biased when it comes to evaluating their treatment of their own populations."[34] Since supranational instances pool a wider range of experiences than their domestic counterparts, self-governing communities have a good reason to accept their supervision.

Second, building a supranational human rights regime—of its legal documents, rules, procedures, and instances—is a collective act of precommitment that involves more than one political community. The parties to the agreement tie their own hands together. They precommit themselves to supervise, through the institutions they create, each other's human rights record, and to submit to the joint supervision. They own the authoritative decisions taken by the relevant supranational bodies not separately but in common. Once the framework of analysis is established, the remaining question of residual control may still raise difficulties of legal design but it certainly does not raise difficulties of political principle.

Notes

[1] See, for example, European Court of Human Rights, *Bukta and others v. Hungary*, and *Vajnai v. Hungary*.

[2] Stephen Holmes, "Precommitment and the Paradox of Democracy," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), 195–240.

[3] Jeremy Waldron, "Precommitment and Disagreement," in *Law and Disagreement* (New York: Oxford University Press, 1999).

[4] In this paper, I will use the expressions "legislation by a representative assembly" and "representative government" interchangeably. In the same manner, "government by direct popular vote" will stand for "legislation by direct popular vote." The other branches of government will be ignored (except for the judiciary in its role of exercising constitutional review).

[5] See Ronald Dworkin, *Freedom's Law* (Cambridge, MA: Harvard University Press, 1996), 28.

[6] Ibid.

[7] Holmes, "Precommitment and the Paradox of Democracy," 235 ff.

[8] Waldron, "Precommitment and Disagreement," 276. See Jon Elster, *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1979), 39.

[9] Holmes, "Precommitment and the Paradox of Democracy."

[10] In *Solomonic Judgments*, Elster points out that precommitment as a method of dealing with cognitive asymmetry over time was considered already by Spinoza both at the level of individual and of collective political action (Cambridge: Cambridge University Press, 1989), 195 f.

[11] Waldron, "Precommitment and Disagreement," 221 ff., 258.

[12] For the distinction between ideal and nonideal theory, see John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Harvard University Press, 1999), 7 ff. It is a different question, not affecting the order in which ideal and nonideeal theory are supposed to follow each other, that certain problems of political morality are specific to nonideal theory. Ideal theory has not much to say, for example, on the moral problems of political leadership; they are raised by the assumptions of nonideal theory. See János Kis, *Politics as a Moral Problem* (Budapest: Central Eurpean University Press, 2008).

[13] Waldron, "Precommitment and Disagreement," 268.

[14] Ibid., 266.

[15] See Jean-Jacques Rousseau, *On the Social Contract* (Indianapolis: Hackett, 1907), 74 ff.

[16] Waldron, "Precommitment and Disagreement," 9, 213.

[17] For an analogy, think of the social construction of descent in simple societies: since in such societies most relations are ordered by kinship and marriage, descent must be constructed in some way or other. But it does not matter whether it is constructed patrilinearly or matrilinearly: the two methods are equivalent. See Claude Lévi-Strauss, *Elementary Structures of Kinship* (Boston: Beacon Press, 1969).

[18] In his *Democratic Authority* (Princeton, NJ: Princeton University Press, 2008), David Estlund calls this position epistemic proceduralism, and he distinguishes it from purely epistemic and purely procedural conceptions. Estlund wants to show that democracy is epistemically superior to non-democratic systems. I am interested in comparisons between alternative decision procedures that equally claim to be democratic.

[19] For an example, see Rawls's reference to the adversarial court procedure as an instance of what he calls "imperfect procedural justice," in Rawls, *A Theory of Justice*, 74 ff.

[20] Waldron, "Precommitment and Disagreement," 137.

[21] On "rational ignorance," see Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957).

[22] See Dennis C. Mueller, *Public Choice III* (Cambridge: Cambridge University Press, 2003), 221 ff. Behavioral economics established many other biases such as, for example, the bias in favor of the status quo, the tendency of overvaluing what one already has, and the asymmetry between judging the loss or the gain of the same thing.

[23] See Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008).
[24] See Waldron, "Precommitment and Disagreement," 71 f.
[25] On rational ignorance, see Downs, *Economic Theory of Democracy*.
[26] The main argument proposed by Dworkin in support of his "partnership conception" of democracy seems to me very similar to the one I am presenting in this paragraph.
[27] See Kenneth O. May, "A Set of Independent Necessary and Sufficient Conditionsfor Simple Majority Decision," *Econometrica* 20 (1952) 680–84; Douglas W. Rae and Eric Schickler, "Majority Rule," in *Perspectives on Public Choice*, ed. Dennis C. Mueller (Cambridge: Cambridge University Press, 1997).
[28] For the two aspects of public communication, see Kis, *Politics as a Moral Problem*.
[29] I dedicated some attention to other weaknesses of accountability in my paper "Constitutional Democracy: Towards a Third Conception," presented at the Holberg Seminar in Honor of Ronald Dworkin, New York University School of Law, April 10, 2008.
[30] Bernard Williams argues that the ethics of political leadership leans more heavily toward consequentialsm than ordinary morality in general. See Williams, "Politics and Moral Character," in *Moral Luck* (Cambridge: Cambridge University Press, 1991).
[31] For an argument from trust in support of judicial review as a democratically legitimized procedure, see Andreas Føllesdal, "Why International Human Rights Judicial Review Might Be Democratically Legitimate," *Scandinavian Studies in Law* 52 (2007), 103–22.
[32] Waldron, "Precommitment and Disagreement," 221 ff.
[33] Ibid., 213.
[34] Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (New York: Oxford University Press, 2003), 295. Buchanan attributes his argument to Kristen Hessler's doctoral dissertation.

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