

# CONSTITUTIONAL PRECOMMITMENT REVISITED

## 1. Introduction

According to a widely held view, the principles of democratic decision-making and those of individual rights cannot be properly honored at the same time. In an article as of twenty years ago, Stephen Holmes argued that the apparent conflict can be dispelled by way of showing that the constitutional constraints needed for the protection of rights are self-imposed disabilities of democratic communities.<sup>1</sup> But Jeremy Waldron leveled powerful objections to this proposal,<sup>2</sup> and today the mainstream view seems to be that his criticism settled the issue definitively.

This 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 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, acratia). 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  $t_2$  being mistaken; he identifies himself with the first and disowns the second. The power to disable oneself to act, at  $t_2$ , on the decisions he would make at the same moment, enhances his capacity to autonomy, since it allows A’s enduring rational self to subject his momentary irrational self 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's argument aims at showing that constitutional constraints enforced by judicial review are not a proper instance of the Ulysses model and that, therefore, they are 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 the purpose of which is to point 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 try to point out that the Ulysses model is based on an abstract structure that admits of other specifications (Section 4), capable of accommodating the fact of disagreement (Section 5) and that of independent judgment (Section 6). The revision of the precommitment idea will allow 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 popular self-government. Sections 4 to 6 will show how a more general model can rescue the idea of representative government as a form of popular self-government.<sup>3</sup> If their argument succeeds, the plausibility of the attempt to understand judicial review in the same terms will increase, too, or so I hope.

## 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 be able to cooperate, people must block themselves from revising the decision procedure they adopt for their common use.<sup>4</sup>

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 decision, 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  $t_2$ .<sup>5</sup>

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, even if he begs 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 oneself is enhancing 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 Ulysses' rational will. This is what makes this case of precommitment compatible with autonomy in action.

Holmes thinks that people who want to act as a collective entity have good reasons for taking recourse to the method of precommitment even if they are fully rational all the way down.<sup>6</sup> Waldron disagrees. He 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 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.<sup>7</sup> 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 to subvert, in a moment of panic or temptation, the community's long-term commitment to honor those principles.

This is the conception 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. The precommitment to judicially enforced constitutional constraints needs a different justification.

Sometimes the justification is said to be provided by democracy's tendency to degenerate into "tyranny of the majority". Majority interests may conflict with the interests of politically powerless minorities, and in pursuing their own interests majorities may recklessly disregard those of the minorities. Worse still, they may be motivated by prejudice and hatred to diminish the status of a minority and to discriminate against its members. Reckless disregard towards the interests of the weak, prejudice and hatred towards minorities betray the foundational intentions embodied in a democratic constitution, and so the majority must be disabled to act on such attitudes.

But if these despicable attitudes are likely to be held by the majority of people in the long run, then it is unclear what would bring their community voluntarily to submit to constitutional restraints, Waldron insists. After all, to see citizens as preoccupied by their own particular or sectional interests or dominated by prejudice and hatred entails seeing them as unwilling to deliberate in terms of justice and the common good the constitution assumes them to do. Waldron calls the anthropological conception underlying such a picture the "predatory view of human nature". If the "predatory view" is correct, he argues, then one is not justified to ascribe political communities a sincere aspiration to honor the principles of

justice and the common good. It is, then, unclear how constitutional restraints can be seen as self-imposed ties in the first place.<sup>8</sup>

Waldron recommends to reject the “predatory view”, and I will follow his recommendation throughout this paper, with the caveat that the behavioral 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. My hope is to be able to show that even communities characterized by such ideal attitudes have good reasons for precommitting themselves to judicially enforced constitutional constraints.

Waldron makes two further important objections, and these are that I want to discuss in detail. The first is an objection 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.<sup>9</sup>

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”.<sup>10</sup> We have good reasons to ascribe his long-term plan to him while assuming his behavior in the grip of temptation to be alien to him. His decision at  $t_1$  responds to the value he attributes to staying alive correctly while the irresistible temptation to swim to the sirens’ island at  $t_2$  reflecting a temporary incapacity to correctly respond to that value. In a community divided by disagreements, however, a change in the attitude of the public to a practical problem is typically due to a shift in the majority opinion. There is no reason for identifying the earlier majority attitude with the genuine attitude of the community, while judging the later one to be inauthentic. If so, precommitment does not protect genuine

collective value commitments against momentary “aberrations of rationality”,<sup>11</sup> it rather secures ascendancy to one transient majority opinion over the others.

Secondly, in Ulysses’ story, the crewmen, acting on Ulysses’ instruction, can be viewed to be externalized organs of Ulysses carrying out his will. 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. Justices and legislators may disagree on whether the law satisfies the relevant constitutional principles, as if the crew disagreed with Ulysses on whether and when he should be unbound. But, then, the Court cannot be seen to be an external organ of the legislature executing its true democratic will. Call this the objection from independent judgment.

Waldron concludes that the idea of constitutional precommitment consistent with popular self-government is irredeemable. If he is right, then judicial review and popular self-government are incompatible. But so are popular self-government and legislation by a representative assembly. Representatives are a minuscule subclass of the citizenry. Their decisions are subject to perennial disagreements. Suppose the majority of citizens dissent a decision adopted by the majority of representatives. It is unclear how that decision could be ascribed to the community as expressing its genuine value attitudes rather than just a minority attitude. Furthermore, the representatives are not supposed to take mandatory instructions from the electorate, but rather to act on their considered convictions. But, then, 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 can’t. If a community abides by laws made by an assembly of representatives, it gives itself into servitude, he insisted.<sup>12</sup> 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 popular self-government.<sup>13</sup> 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 to reconcile constitutional precommitment with popular 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 his rational deliberations while 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 correct 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 recourse 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 it by functional equivalents in both these roles, and the possibility of replacing mandatory instructions in their role as a 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 necessary such that its outcomes are binding for all; 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 that the alternative procedures be equivalent to each other.<sup>14</sup> If they are, then 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 or out. Precommitment would boil down to what Waldron calls a mere “pre-decision”.

I think, however, that although it is conceivable, the equivalence of alternative political decision procedures is not in fact the case. 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 at more likely to allow correct decisions than its feasible alternatives, I will speak about *epistemic asymmetry* between the alternative procedures.<sup>15</sup> The Ulysses model includes epistemic asymmetry, too: the procedure disabling the agent to act on his decision at  $t_2$  allows correct decision taken at  $t_1$  to defeat the grossly mistaken decision to be taken at  $t_2$ , while its alternative allowing 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 an aim to disable the agent to adopt and/or to act on the 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.

Can we also claim that precommitment to an epistemically superior decision procedure is enhancing the community's capacity for autonomy? In cases that conform to the Ulysses model, precommitment appears to be autonomy-enhancing because the correct decisions truly pertain to the rational agency of the person while the mistaken decisions are due to irrational drives alien to him. The question is, whether a distinction of a similar structure survives the elimination of cognitive asymmetry.

Notice that the subject of precommitment in the present case is a collective entity. Once in possession of a decision procedure, it can own decisions as a whole. Those decisions are made in its name even if not all members participated in their adoption or endorsed it. If a group of people settled on a collective decision procedure, and if a decision is taken in accordance with that procedure, then the group as a distinct agency owns that decision, and bears responsibility for it. This makes it possible for the group as a whole to own a decision while some of its members (perhaps their majority) being justified to disown it and deny responsibility for it.

But the group as a whole owning a decision is compatible, too, with cases when all members are justified to see themselves as co-owning that decision and to claim responsibility for it. I would say that in the former type of cases the collective decision pertains to the group in a technical sense only while in the second type of case pertaining to it *genuinely*.

In any event, the distinction between decisions that are true decisions of the agents and those that are not is a meaningful distinction in the domain of collective action, and it can be made sense of without any appeal to cognitive asymmetries. But can it be made sense of in the context of the epistemic asymmetry between alternative collective decision procedures? It can, and moreover, it can in two different and mutually supportive ways.

Epistemic asymmetry matters, first, directly. Suppose a member of the collective entity disagrees with a common decision. In itself, the fact of disagreement is not a sufficient reason for her to disown the decision. Disagreements are to be settled in some way or other, and nobody can have a right to veto all collective decisions she disagrees with. But suppose the dissenter 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 to believe that the decision she is convinced to be mistaken came into force in virtue of a majority bias in favor of a procedure likely to yield such decisions that are mistaken but advantageous to the majority, and this is a sufficient reason for her to disown it.

Next, epistemic asymmetry matters indirectly. For a member of the collective entity to be justified to see oneself as co-owning the common decisions, the decision-making process and its outcomes must treat her in a way she has good grounds for endorsing. To put it briefly, she must be treated as an equal both as a party to the process and as a target of its outcomes. But people disagree on what it does mean for a member to be treated as an equal in general, and on the requirements the claim of equal membership imposes on particular contexts. They must collectively to decide which of the rival conceptions of equal membership to adopt for the

aims of regulating their common decisions. This brings us back to the general point made in the previous paragraph. Suppose a member disagrees with the conception of equal membership on which the group as a whole comes to settle. Then, if the controversial conception is adopted according to a procedure that is epistemically inferior to some feasible alternative procedure, she has good grounds for thinking that the conception she is convinced to be 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.

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 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.<sup>16</sup>

One might object that people disagree on the evidence concerning the epistemic virtues of collective decision procedures, too. So the appeal to the epistemic asymmetry between alternative procedures, rather than meeting the objection from disagreement, merely pushes the same objection one step higher.

I do not deny that the higher-order, procedure-regarding judgments are subject to disagreements. But I want to remind that first-order disagreements often take their origins from collisions of deep convictions, while the higher-order, procedure-regarding disagreements tend to be shallow, so to speak, and therefore they are more easy to overcome.

This answer may invite, however, a further objection. The availability of separate evidence concerning the higher-order judgments on decision procedures does not neutralize the relevance of first-order judgments on particular decisions. Someone who judges the collective decisions to be wrong too often or in too important ways may take such judgments to cast doubt on the epistemic virtues of the very procedure that allowed the wrong decisions to be adopted.

Again, I think this objection would be fatal under extremely special conditions only. Let  $P_1$  and  $P_2$  be alternative decision procedures. And let them be exactly alike with regard to all procedural instruments  $\sigma, \tau, \nu, \dots$ , except for the instrument  $\phi$  that can exist in two and only two forms,  $\phi_1$  and  $\phi_2$ ,  $P_1$  entailing  $\phi_1$  while  $P_2$  entailing  $\phi_2$ . Suppose higher-order considerations establish a presumption that  $P_1$  is epistemically superior to  $P_2$ , and so the community of which citizen  $C$  is a member settles on  $P_1$ .  $C$  makes, however, good-faith first-order judgments to the effect that the decisions allowed by  $P_1$  are much worse than those allowed by  $P_2$ . Then,  $C$  is rational to believe that the variable explaining the difference is  $\phi$  and, that, in order to improve the performance of  $P_1$ ,  $\phi_1$  should be replaced by  $\phi_2$ . This replacement, however, would transform  $P_1$  into  $P_2$ . The first-order dissent to the decisions allowed by  $P_1$  leads  $C$  immediately to challenge the presumption of epistemic superiority of  $P_1$  over  $P_2$ .

But this is not how alternative decision procedures typically relate to each other. In a standard case, they are more distant to each other: they differ in quite a number of instruments, many of these resisting attempts to export them from one procedure into the other, or being capable to adopt specific non-exportable forms. If  $P_1$  and  $P_2$  stand in such a relationship to each other, then  $P_1$  can be improved in various different ways without getting transformed into  $P_2$ : if  $C$  has reason for thinking that  $\phi_1$  is responsible for the inaccurate decisions, she may find that  $\phi_1$  can be replaced by  $\chi$ , an instrument compatible with  $P_1$  but

incompatible with  $P_2$ . Call reforms such changes that leave the identity of  $P_1$  with regard to  $P_2$  unaffected. As long as  $C$  has reasons to believe that is  $P_1$  reformable, her first-order judgment concerning the decisions permitted by  $P_1$  need not translate into a rejection of the second-order presumption.

To sum up, if a community settles on a decision procedure that is epistemically superior to its feasible alternatives, it thereby enables itself to reach decisions that pertain to it genuinely, not just technically. If so, settling on the epistemically best available decision procedure is enhancing the community's capacity for autonomy or self-government. It is particularly autonomy-enhancing if the community honestly aspires to treat all its members as equals, and guided by this aspiration, it adopts that conception of equal membership to regulate its collective decisions that is allowed by the epistemically best available procedure.

Suppose, however, that—as I mentioned it already—representative government is epistemically superior to government by direct popular vote. It follows that settling on representative government rather than on government by direct popular vote is enhancing the community's capacity for autonomy. However, the representatives are but a minuscule subgroup of the community to which they give law. This brings us to the question if representative government is compatible with the community's exercising autonomy in action. Earlier, outlining the skeleton of the model of precommitment I said that when a distinct agency is authorized to take decisions for an individual or a group, the authorizer must have adequate control over the recipient of authority in order for authority to be compatible with autonomy. Giving mandatory instructions to the recipient of authority is one way for the authorizer to remain in control. Representative government cannot do its job, though, if the representatives have to obey to mandatory instructions. Some other method of control is needed, one consistent with the representatives' acting on their considered convictions. As we will see, there is such a method: it is called accountability.

We are now in a position to confront Waldron's two objections.

### 5. Facing the objection from disagreement

To remind, the objection from disagreement goes as follows. For precommitment to be autonomy-preserving, the self-imposed constraints must respond to an intention one can ascribe to the agent as his real or authentic intention. Collective agencies can be divided, however, by disagreements, and the fact of disagreement frustrates the attempts at distinguishing between authentic and inauthentic intentions of the group as a whole.

Section 4 provided the skeleton for an answer to this argument. It showed 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 by it.

Let us now turn to the question, how the antecedent of the conditional can be established. I will show this by providing higher-order, outcome-independent considerations that, if true, lend plausibility to the claim that representative government is epistemically superior to government by direct popular vote.

Few think the opposite to be true 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.<sup>17</sup>

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. It 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.<sup>18</sup> Individually rational ignorance becomes collectively irrational, however, if it leads to systematic distortions in the perception of collective decision problems.

Here are two types of issues that are particularly vulnerable to systematic distortions: *complex issues* and *impartiality-sensitive issues*.

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.<sup>19</sup>

Let us now have a look at the type of impartiality-sensitive issues. An issue is impartiality-sensitive if the accuracy of its solution is sensitive to the degree of impartiality with which the competing interests of different individuals and groups are assessed. Treating citizens as equals, for instance, requires taking an impartial stance towards the interests of all. But people perceive each other's interests through the lenses of their own culture and experience. Even if they are motivated by a genuine desire to be impartial, their understanding of the claims of others is loaded by spontaneous cognitive biases. The greater the social and cultural distance between two groups, the more information their members need in order to avoid forming systematically distorted views on one another's interests.<sup>20</sup>

Thus, the complexity of the political issues and the demands of impartial judgment heighten the informational requirements for adequate decisions, and insufficient information has a tendency to give rise to systematically distorted judgments in both respects.

Since the value of information for a voter decreases with the increase of the voting population while the cost of information remaining constant, we have good grounds to conclude that in the voters' judgments on complex issues and impartiality-sensitive issues are

open to systematic distortions. Therefore, the tacit assumption on which Condorcet's theorem rests is not tenable.

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.<sup>21</sup>

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 from 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 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.<sup>22</sup> 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 arguments of the previous two sections hold, 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 a position to make more accurate judgments than the authorizer would be able to pass. 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 to be incompatible 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 each citizen to be justified to see him- or herself as a „partner in the collective venture of self-government”.<sup>23</sup> 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 makes 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 as 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 popular self-government

Apparently it does not matter, and this is true about all the voters, not just about A or those who, like her, voted in favor  $p$ . 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 that 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”-s and vice versa. At no insult to any citizens’s equal standing, the outcome of the collective decision comes to be the opposite of what it was meant to be.

But of course all the citizens would be 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 with a decision-making capacity but as mere means in the hands of an impersonal procedure. In order for the voting procedure to treat voters as equal citizens, it must treat them as autonomous persons whose voting intention must be respected, and it does so by satisfying a principle called *positive responsiveness*.<sup>24</sup>

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 the expressed 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. But 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 running 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 to increase 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, however: even if the deeper intention can be discovered, it has no mandatory force. A's vote binds the electoral committee to count her 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, as long as positive responsiveness holds, the chances for the same citizen that her vote together with the votes of those preferring the same outcome to be decisive are very real. This is one of the reasons that jointly justify her sense to be a partner in collective self-government. Since representative government breaks the chain of positive responsiveness, this condition of self-government gets lost. It is either replaced by some functional equivalent that is compatible with the representatives' freedom to follow their own convictions or the precommitment to legislation by a representative assembly undermines self-government.

Positive responsiveness rests on mandatory instructions, and mandatory instructions have two relevant properties: they have binding force, and they are future-directed. These two properties cannot be jointly compatible with the representatives' freedom to act on their considered convictions. One of them must yield to a functional equivalent that is consistent with "free mandate".

Since the functional equivalent must have some binding implications, it must consist in some retrospective answer to the acts of the agent. 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.

In order for the freedom of the representatives to act upon their considered convictions to be consistent with popular self-government, the citizenry, rather than subjecting the representatives to *ex ante* instructions, must have a capacity to subject them to their *ex post* control.

The capacity of *ex post* control means a capacity to make the course of government changed if the citizenry expresses its collective disagreement with it and its desire for a change. Such an intervention can admit of two different forms: citizens can *overrule the law* adopted by the representative assembly (or the refusal of the assembly to make a certain law they want to have), or they can *remove the legislator*. Both methods can be used in conformity to 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 provide for both methods, removing the legislator is clearly the dominant instrument of 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 by 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 and 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.

And 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 via the public sphere 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, or 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 incentives 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.<sup>25</sup>

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 popular self-government. A citizenry can be said to “rule their officials, in the final analysis, rather than vice versa”, to borrow a formula by Ronald Dworkin,<sup>26</sup> if the officials derive their authority to govern from the citizens and if they are accountable to the latter.

To take stock: I began this section by asking the question whether citizens can co-own collective decisions met by representatives merely in virtue of their being treated as equals. The answer I tried to defend is that for ordinary citizen 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. Equal membership is a distributive concept applying to the relationship between citizens, one by one. Accountability is a collective concept applying to the relationship between the citizenry as a collective agency and its officials.

## 7. Judicial review

We are now in a 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 citizenry to enjoy the advantages of more accurate collective decisions. And it involves further improvements in the quality of those decisions, since—as we had the occasion to see—having more information on complex issues and on impartiality-sensitive 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 will limit myself here to the discussion of one of these: accountability has a built-in tendency

to give rise to perverse effects.<sup>27</sup> 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 beliefs they cannot endorse in good faith.

If a representative nourishes “predatory” attitudes, she will have no scruples to defer to mistaken electoral beliefs. But we can stick to the uncompromising rejection of the “predatory view” and yet agree that, sometimes, a legislative faction 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 their rival would cause to the community. Such judgments may be due to self-deception. But, at least on some occasions, they are not.<sup>28</sup> When they are not, the faction 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 or, more generally, the equal membership of even a single citizen, self-government 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 of a deep one at that. People who judge an act to be rights-violating tend to think it to be *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. Citizens who want the political processes of their community to respect the equal membership of all and who see that a tendency to give rise to equality-violating treatment is built into the structure of those processes have good reason to want to see that assurance given.<sup>29</sup>

This brings us to the constitutional device of entrenching principles of justice and rights in a foundational document and empowering a body of Justices to review legal enactments for their compatibility with those principles. According to Waldron, "to embody basic principles in an entrenched document" is to adopt an attitude of "self-assurance combined with mistrust" towards 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".<sup>30</sup> 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".<sup>31</sup> 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 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. 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 than precommitting legislation to judicial review enhances the self-governing capacities of the community.

But doesn't it at the same time undermine self-government in action? There are good reasons for raising this question, since the Justices are deliberately insulated from the electoral process, and so 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. Secondly, 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.

Representatives may overrule a controversial judicial decision by passing a constitutional amendment. How often they can do this depends on the stringency of the amendment rules. 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 literally impossible. How difficult it should be is a matter of judgment. In any case, it must not 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 revise the constitutional provision on which that verdict rests.

Even if possible, such reversals of judicial verdicts must not happen very often. One may therefore doubt whether the methods of control at the legislature's disposal are sufficient to prevent the authorization of the Justices to degenerate into a surrendering of popular 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. Secondly, the exceptional and strictly regulated judicial interference with legislative decisions plays a 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 one more consideration. The rare occasions on which the legislature is capable to overrule judicial decisions are not as isolated episodes. Legislatures have a softer method at hand to try to bend the outcomes of judicial decisions towards 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, and then it comes to overturning the judicial decision.

My argument does not aim to evaluate actual practices in existing constitutional democracies. It is one question, whether a particular constitutional democracy subjects the Justices to adequate control. It is quite another question, what are the criteria of adequate control and whether, *if* a democratic constitution meets those criteria, its allowing Justices to strike down pieces of legislation is compatible with popular self-government.

## 8. Conclusion

This paper proposed an alternative to the cognitive asymmetry/mandatory instructions model of precommitment. The revised model explains precommitment in terms of the unequal likelihood of different decision procedures to yield correct decisions, and it explains in the general terms of control why precommitment can, under suitable circumstances, enhance the capacity of a community for self-government and be compatible with its exercising self-government in practice. Interpreted in its terms, 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 is an instance of the epistemic asymmetry/control model.

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 it applies to representative government, it is specified as an epistemic asymmetry/accountability model.

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

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<sup>1</sup> 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.

<sup>2</sup> Jeremy Waldron, „Precommitment and Disagreement”, in Waldron, *Law and Disagreement*. Oxford–New York: Oxford University Press, 1999.

<sup>3</sup> 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).

<sup>4</sup> Holmes 1988, 235 ff.

<sup>5</sup> Waldron 1999, 276. See Jon Elster, *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1979) 39.

<sup>6</sup> Holmes 1988.

<sup>7</sup> 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).

<sup>8</sup> Waldron 1999, 221 f, 258.

<sup>9</sup> Waldron 1999, 268.

<sup>10</sup> Waldron 1999, 266.

<sup>11</sup> Waldron 1999, 268.

<sup>12</sup> See Jean-Jacques Rousseau, *On the Social Contract* (Indianapolis–Cambridge: Hackett, 1907), 74 f.

<sup>13</sup> Waldron 1999, 9, 213.

<sup>14</sup> 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 patrilineally or matrilineally: the two methods are equivalent.

<sup>15</sup> In his *Democratic Authority* (Princeton: 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.

<sup>16</sup> For an example, see Rawls’ reference to the adversarial court procedure as an instance of imperfect procedural justice, in John Rawls, *A Theory of Justice*. New York-Oxford: Oxford University Press 1971.

<sup>17</sup> Waldron 1999, 137.

<sup>18</sup> On „rational ignorance”, see Anthony Downs, *An Economic Theory of Democracy*. New York: Harper & Row, 1957.

<sup>19</sup> See Dennis C. Mueller, *Public Choice III* (Cambridge: Cambridge University Press 2003), 221 f.

<sup>20</sup> See Thomas Christiano, *The Constitution of Equality*. Oxford: Oxford University Press, 2008.

<sup>21</sup> See Waldron 1999, 71 f.

<sup>22</sup> On rational ignorance, see Anthony Downs, *An Economic Theory of Democracy*. New York: Harper & Row, 1957.

<sup>23</sup> The expression “a partner in the collective venture of self-government” is Ronald Dworkin’s. See his

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*Freedom's Law*, Cambridge, Mass.: Harvard University Press 1996. 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.

<sup>24</sup> See K.O. May, “A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision”, in *Econometrica* 20 (1952) 680-684; D.W. Rae and E. Schickler, “Majority rule” in D.C. Mueller, ed: *Perspectives on Public Choice*. Cambridge: Cambridge University Press, 1997.

<sup>25</sup> For the two aspects of public communication, see János Kis, *Politics as a Moral Problem*. New York–Budapest: Central European University Press, 2008.

<sup>26</sup> See Ronald Dworkin, *Freedom's Law* (Cambridge, Mass.: Harvard University Press 1996), 28.

<sup>27</sup> I dedicated some attention to the 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.

<sup>28</sup> Bernard Williams argues that the ethics of political leadership is more heavily leaning towards consequentialism than ordinary morality in general. See Williams, “Politics and Moral Character”, in *Moral Luck*. Cambridge: Cambridge University Press, 1991.

<sup>29</sup> 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, in *Scandinavian Studies in Law* 52 (2007) 103-122.

<sup>30</sup> Waldron 1999, 221 f.

<sup>31</sup> Waldron 1999, 213.