Waluchow's constitutional morality and the artificial reason of the Common Law

La moralidad constitucional de Waluchow y la razón artificial del Common Law

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Recepción: 8 de diciembre de 2023
Aceptación: 19 de noviembre de 2024
Publicación: 5 de diciembre de 2024

DOI: https://doi.org/10.22201/iij.24487937e.2025.19.18773

Resumen: El presente artículo propone aclarar la noción de moralidad constitucional de Wilfrid Waluchow explicando cómo se relaciona con la idea de razón artificial del *common law*. Se enfoca en mostrar cómo los esfuerzos de Waluchow por reconciliar las ideas del pensamiento de H. L. A. Hart y Ronald Dworkin mediante la idea de la moralidad constitucional recuerdan a la razón artificial del *common law* y al mismo tiempo se diferencian de ella. Explica cómo la noción de moralidad constitucional encuentra su base en la sutil unión de costumbre y razón encontrada en la razón artificial, pero también cómo la noción de moralidad constitucional propone, bajo la influencia de la noción de regla de reconocimiento de Hart, una comprensión más estrecha del fundamento del derecho en la costumbre, y otorga, siguiendo la teoría interpretativa de Dworkin, un mayor alcance teórico a la racionalidad del derecho.

Palabras clave: Wilfrid Waluchow; moralidad constitucional; razón artificial; revisión judicial; *Common Law* clásico.

[1] The present article is a modified and translated version of some of the developments found in the book *Constitutionnalisme et common law dans la pensée juridique anglo-américaine* (Bouchard, 2021). The author wishes to thank Mary Baker for her help in translating the text from French, the anonymous reviewers for their excellent comments and the Secrétariat du Québec aux relations canadiennes for its financial support.

Abstract: This article proposes to elucidate Wilfrid Waluchow's notion of constitutional morality by explaining how it relates to the classical common law idea of artificial reason. It examines how Waluchow's effort to reconcile insights from the thought of H.L.A. Hart and Ronald Dworkin through the idea of constitutional morality is both reminiscent of the artificial reason of the common law and distinct from it. It shows that constitutional morality evokes the subtle union of custom and reason found in artificial reason, but also that it proposes, under the influence of Hart's notion of rule of recognition, a narrower understanding of law's foundation in established practices, and that it gives, consistent with Dworkin's vision of law as integrity, a greater theoretical scope to law's rationality.
Keywords: Wilfrid Waluchow; constitutional morality; artificial reason; judicial review; classical common law.

I. Introduction

Canadian philosopher Wilfrid Waluchow's turn to the common law method to explain and justify the practice of judicial review according to charters of rights (Waluchow, 2007b) is part of a broader movement in Anglo-American legal thought in the last decades of the twentieth century that led many thinkers to take a second look at their specific legal tradition and rediscover the relevance of its underlying vision of law for explaining the new role played by judges in liberal democracies. Since its origins, the common law tradition has been associated with the idea of the rule of law, and its custom-centred understanding of the law has singular virtues for explaining the characteristic rationality of judicial decisions. Waluchow suggests in his theory of judicial review that a charter of rights should be seen as a modest commitment to rights that must then be refined by judges using the traditional common law method. Common law judges are trained to discover the coherence that emerges from the established law and practices of a community and to apply it in a way that is appropriate to the circumstances and life of that community.

We would like in this paper to examine the relations between Waluchow's theory of judicial review and the common law tradition, by focusing on its notion of constitutional morality. With constitutional morality, Waluchow depicts law as grounded both in long-standing practices and consensuses, and in their internal rationality. He explains how judges manage to discover a form of coherence that emanates from the legal practices and institutions of a community, and he makes judges appear as spokespersons of a social and institutional reality that pre-exists their will, rather than as legislators in disguise. We would like to show that the combination of established practice and of reason that we find in constitutional morality is reminiscent of the classical common law notion of artificial reason, which describes law as the result of a subtle articulation of custom and reason, and is discovered, rather than created by judges (Postema, 2002; Postema, 2003). We think that placing Waluchow's notion of constitutional morality in relation with the classical idea of artificial reason makes it more intelligible, while also pointing out its originality and opening interesting critical perspectives.

In order to understand the complex relationship of constitutional morality with the common law tradition, it is necessary to take into account the fact that Waluchow's theory tries to find a middle ground between H.L.A. Hart's and Ronald Dworkin's visions of the law. The shift toward common law constitutionalism in the past decades was indeed strongly influenced by the work of Ronald Dworkin and his biting critique of legal positivism. Dworkin's view is that H.L.A. Hart's theory of law does not adequately capture the perspective of those involved in legal practice, and he proposes to replace it with an interpretive approach inspired by the common law method (Dworkin, 2006, p. 251). Wilfrid Waluchow developed his own understanding of law in the midst of the turmoil created in the positivist camp by Dworkin's critique. He remained convinced of the relevance of Hart's theory of law and sought to find common ground between it and Dworkin's.

We will show that the relations of Waluchow's notion of constitutional morality with the deeper sources of English legal thought found in the classical common law are conditioned by elements drawn both from Hart's and Dworkin's understanding of the law. Waluchow's effort to integrate elements of Dworkin's interpretive method into Hart's legal theory leads him to develop a broad understanding of the rule of recognition, which allows him to insist on its social, customary and institutional anchoring while at the same time attributing to it a certain moral significance. Waluchow's notion of constitutional morality builds on this broad understanding of the rule of recognition, and we will argue that it is reminiscent of the classical notion of artificial reason when it depicts constitutions and charters of rights as resulting from traditions and consensuses that have developed in a society over time and as containing a particular form of rationality that judges trained in the common law can discover. We will also underline the fact that constitutional morality differs in some respects from the classical notion of artificial reason. Indeed, constitutional morality remains fundamentally structured by Hart's positivistic understanding of law, it gives a for of precedence to the authorities point of view in the definition of law that is in tension with the traditional understanding of the common law as a rational discovery (Bouchard, 2021, pp. 99ff). The influence of Dworkin's view of law as integrity similarly leads Waluchow to give greater philosophical significance to the underlying coherence of settled law than in the classical common law view. Dworkin rejects, after criticizing Hart, the idea of a conventional foundation of law and insists instead on the argumentative, abstract character of legal practice (Dworkin, 1986, pp. 13-14). Waluchow takes inspiration from Dworkin when he invites us to discover the general moral and political theory that lies behind received practices, with the result that constitutional morality refers as much to an abstract conception of justice as to the arrangements and compromises that emanate from existing legal practices.

We will begin by reminding briefly some of the main characteristics of the classical notion of artificial reason and then turn

to an examination of Waluchow's notion of constitutional morality, explaining how it seeks to reconcile certain aspects of Hart's and Dworkin's thought. This will enable us in the end to compare the articulation of established practice and reason that we find in Waluchow's theory of judicial review with the one found in the classical notion of artificial reason.

II. Artificial reason

In order to understand how Waluchow's idea of constitutional morality relates to the classical notion of artificial reason, we must first outline its essential features. The notion of artificial reason appears in the classical conception of the common law that was formulated in England in the seventeenth century (Postema, 2002b, pp. 599-600; Berman, 1994, p. 1682) by jurists such as Edward Coke (Coke, 2003) and Matthew Hale (Hale, 1971; Hale, 2017). The classical common law is characterized by deference to the ancient custom of England and, above all, by an effort to answer the legal questions of the present in the light of patient study of the solutions discovered by jurists in the past, for the sake of historical continuity. Attention to the past in the common law tradition is not an end in itself, but ultimately a means of discovering what is reasonable in the law. At the heart of the classical conception of common law lies a subtle articulation of custom and reason, where reason is conceived as somehow internal to English custom. The notion of artificial reason describes for the common lawyers the special form of rationality at work in the common law tradition (Coke, 2003, p. 481; Hale, 1924, p. 506). It refers to the wisdom that has sedimented into English custom over time, thanks to the cumulative efforts of a great many prudent men. This wisdom of law is superior to that of individuals equipped only with their natural reason (Coke, 2003, p. 173; Hale, 1924, p. 503). It allows the law to be based on the mutual expectations that have crystallized over time between the members of a society and between them and their rulers, in other words,

on a common or "intersubjective" reason, rather than on the individual reason of an interpreter or legislator or on an abstract theory. To grasp what gives the artificial reason its distinctive character, we have to understand the special way it weaves custom and reason together, and how it is related to the idea of natural law.

1. *Foundations in custom*

The notion of artificial reason gives a pivotal role to custom in its understanding of law. According to the classical understanding, the common law is the general custom of England and is based on the combination of ancient habits and general practice (Coke, 2003, pp. 563-564; Hale, 1971, pp. 16-17). Fundamentally, its origin lies in habits and repeated practices that have become engraved, so to speak, in shared memory over time (Postema, 2002a, p. 169; Postema, 2002b, p. 590). As a *lex non scripta*, the common law comes essentially from the practices and habits received in England, and it therefore always precedes, in a certain sense, the different formulations it can be given, whether in a court decision or in a legislative text. It depends in other words on shared practices, the full meaning of which no individual or institution can claim to express exhaustively. In the classical conception, the common law is a "great Substratum" (Hale, 1971, p. 46) of customs to which we must constantly refer to discover the law applying in specific situations. This anchoring in custom explains why the common lawyers argued that judges do not create common law but are simply its spokespersons (Coke, 2003, p. 173; Hale, 1971, p. 45). Judges are seen as experts entrusted with inquiring into a set of customs that pre-exist their decisions and of which they seek to bear witness as accurately as possible.[2]

[2] Hale, like A.W.B. Simpson a few centuries later, compared the task of attempting to capture the common law to that of trying to formulate rules of grammar (Hale, 2017, pp. 163-164; Simpson, 1987, p. 21). In both cases, the goal is to describe practices that have no obvious rational foundation and that can never be entirely reduced to stated rules. The rules of the common law, like the rules of grammar, have no immediate reasons aside from custom, and they always remain subject to improvement and review because the bedrock of customs

The common lawyers of the classical era recognized the distance separating the common law from general custom, but for the most part they insisted on the common law's essential dependency on those very customs (Postema, 2002b, p. 592).[3] Common law has to coincide as closely as possible with general custom, yet it is seen at the same time as the best exegesis of that custom. We could say that the common law is a form of general custom that has been clarified over time through the work of jurists and judges.

The deference to England's customs that we find in the classical conception of the common law is not a blind attachment to origins, but an attempt to deal with the difficulties of the present in light of patient study of solutions discovered in the past, with a concern for continuity and faithfulness to communal life in England.[4] Custom is defined specifically by the fact that its precise origins remain largely unknown: they have been lost to time immemorial (or as was commonly said, *time out of mind*) (Coke, 2003, p. 63). In the classical understanding, the question of the origins of law remains secondary to that of continuity and consistency with existing customs (Hale, 1971, pp. 39-44; Hale, 2017, p. 215). The common law is meant to espouse as closely as possible the life specific to a community, in an ongoing process of adjustment and improvement. It has been fashioned over time to correspond to English customs,

that they seek to describe refers to an infinite variety of circumstances and to complex activities that are, moreover, likely to evolve over time (Hale, 2017, p. 172).

[3] The common law courts certainly contributed to centralizing the government of England, but they did so largely on the basis of local customs (Postema, 2002a, pp. 159-160).

[4] Glenn Burgess explains that the spirit of the classical conception of the common law was not a simple idealization of the past harkening back to a kind of golden age that had to be re-established, but a form of glorification of the present. The primary goal of the classical vision was not to criticize the present, but to justify it, to show how it was the result of a process of gradual perfecting that had followed the thread of history, making it possible for the law to always remain perfectly adapted to the needs of the English nation. This vision found in the constant capacity to harmonize the law with the English situation the element that made it possible to assert the continuity of present and past common law, despite the changes that had occurred. This form of ongoing perfect adjustment led to seeing present-day law as the culmination of a process that made it the best possible law for England (Burgess, 1992, pp. 17-19, 87).

even as it has helped to shape them, which makes it the law best adapted to life in England.

2. *The reason of the law*

The customary nature of the common law does not make it obscure and closed in on its particularity. The patient examination of customs that is at the heart of the classical conception of the common law is in fact intended to be exacting research of the rationality that is at work in those customs (Coke, 2003, p. 570; Postema, 2002a, pp. 168ff.). "Reason is the soul of law [*ratio est anima Legis*]" (Coke, 2003, p. 742) and law must be seen as a coherent whole (Postema, 2002a, p. 178). The common law has an internal order or harmony that can only be discerned through a long and diligent study of established law (Coke, 2003, pp. 742-743). Advanced knowledge and understanding of the common law makes it possible to recognize the specific form of coherence that can be drawn from the principles and habits of thought long received in England and to respect the "consonance and consistence of the law to itselfe" (Hale, 1924, p. 506).

Artificial reason is a form of reason that is acquired by learning and exercising a particular art, and it must for this reason be distinguished from individual natural reason. It is the "special reason of the thing" (Hale, 2017, p. 189) that common lawyers aim to grasp, and it is in this sense closely linked to the professional knowledge and modes of reasoning acquired by English jurists through study and experience with English law (Hale, 1924, pp. 501-502). "[…] [T]the common Law it selfe is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every mans naturall reason, for, *Nemo nascitur Artifex* [No one is born an artificer]" (Coke, 2003, p. 701).

The artificial reason of the common law can be described as a form of judgment, wisdom, prudence and skill that is informed by the law established in the Kingdom and depends on a long

practice of that law (Coke, 2003, pp. 165, 173-174, 210). Artificial reason is also different from natural reason in that it supposes taking part in a serious form of discussion ultimately destined to play out in court. It is significant that English jurists become familiar with the common law by becoming immersed in the courts' discursive habits and by undergoing many years of training in the Inns of Court, during which they read, think and discuss common law together (Coke, 2003, pp. 5, 39-41, 590). Knowledge of the common law supposes taking part in a form of educated shared discussion with past and present jurists, which aims at gaining a better understanding of English custom (Hale, 2017, p. 162).

Law's artificial reason is seen as superior to individual natural reason because it is shared. The common lawyers of the classical period insisted on the myopia and bias of individual reason subject to the influence of appetites and passions (Coke, 2003, pp. 570-571, 730, 872; Hale, 2017, pp. 111-112). Coke rejected the "crooked cord of private opinion" (2003, p. 730) as a means of knowing law. Men generally see the products of their own reason more clearly and immediately and they tend to be "in love with the product of their own heads" (Hale, 2017, p. 176), which carries the risk of preventing them from making appropriate judgments about what is required by the law. It is important to note that this insistence on the limits of natural reason is less a rejection of reason than an invitation to correct and enrich individuals' narrow, private views by referring to the shared, public reason of the common law. The patience, prudence and impartiality of which an individual (or even all individuals during a time) is capable always remains limited, even in the best cases. In contrast, the common law's reason has stood the test of time. It has long been received and has been informed by more wisdom and experience than natural reason would ever be able to absorb (Hedley, 1966, pp. 175-176; Hale, 2017, pp. 160, 168-169).

> This legall reason, *est summa ratio*. And therefore if all the reason that is dispersed into so many severall heads were united into one, yet could

> he not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme, as the old rule may be justly verified of it, *Neminem oportet esse sapientiorem legibus:* No man (out of his owne private reason) ought to be wiser than the Law, which is the perfection of reason (Coke, 2003, p. 701).

When called upon to rule on a case, common lawyers have an advantage over people with no legal training since they can refer to the judgments and reasons that have been set out by the finest jurists of earlier times, who were themselves informed by the judgments and reasons on similar problems set out by the best jurists who went before them (Coke, 2003, p. 561; Hale, 1924, pp. 504, 506). The artificial reason of the common law thus forms a vast reservoir of practical experience that can expand the limited judgment of the jurists of today.

3. *Relationship to natural law*

The idea that the common law involves a special form of rationality raises the question of the relationship between the common law's reason and natural law. The common law has its own "special reason", but the classical common lawyers also held that it was as close as possible to natural law. The fact that "classical common law jurisprudence sought to wrap itself in the mantle of classical natural law theory" (Postema, 2002a, p. 176) could lead one to see the common law's artificial reason as an English variation on medieval scholasticism's theory of natural law, but such an understanding tends to obscure several of the most distinctive aspects of the classical conception of the common law.

It is true that prior to the seventeenth century, the common lawyers tended to accept the classical natural law theory idea that divine law is the source of common law (Fortescue, 1980, pp. 241-243; St. German, 1974, pp. 27-31; Postema, 2002a, p. 177). How-

ever, several centuries before Coke and Hale, there were already the seeds of a special articulation between law and natural law in works in the common law tradition. For example, both John Fortescue and Christopher St. German acknowledge that natural law plays an important role in general, but this acknowledgment is accompanied by a description of English law that focusses almost exclusively on the law itself, in its ordinary meaning (Postema, 2017, p. xxiv). Fortescue and St. German explain that the common law tends to merge with natural law, and that "to discern the law of God and the law of reason from the law positive is very hard" (St. German, 1974, p. 27), but at the same time they quite systematically avoid discussions aimed at linking the law they describe directly to natural law principles: "it is not used among them that be learned in the laws of England to reason what thing is commanded or prohibited by the law of nature, and what is not" (St. German, 1974, p. 31; Burgess, 1992, pp. 30-32).[5] For the common lawyers, natural law retained symbolic priority, but existed in a manner almost parallel to common law, and it remained in many respects separate from the practice of law (Postema, 2002a, pp. 177-178). Indeed, the common lawyers tended to insist less on the subordination of the common law to natural law than on how the two legal systems were in concord, while at the same time accepting that the rationality specific to the common law was to some degree independent (Burgess, 1992, p. 251; Postema, 2002a, p. 178). The blurred lines that were maintained in this way between natural law and the common law made it possible to attribute to the common law something of the majesty of nature while still giving primacy to its human origin (Baranger, 2008, p. 29-31).

Hale sheds interesting light on the question of the relationships between natural law and the common law. According to him, even though men can often agree on the general principles and shared

[5] Fortescue explains that the common law is related to divine law and to natural law as the moon is related to the sun but that, just as studying the sun does not allow us to know the course of other stars, knowledge of divine law or natural law does not teach us about human law, which requires many years of more specific study (Fortescue, 1980, p. 242).

ideas that should govern a society, the practical meaning of those principles and ideas most often escapes individual reason and gives rise to great discord, even among the most impartial, highly intelligent people (Hale, 1924, pp. 502-503; Hale, 2017, pp. 37, 163). Natural law therefore generally proves to be an undetermined, permissive form of law (*lex permissiva*) that requires, in practice, help from established law (Hale, 2017, pp. 107-112). To avoid disputes that arise in practice concerning natural law principles and to achieve convergence of judgments, natural reason needs help from law's artificial reason:

> [...] the wisdom of laws, especially of England, is to determine the general notions of [that which is] just and honest by particular rules, applications, & constitutions found out and continued by great wisdom, experience and time, and thereby to settle that variety and inconstancy of particular applications and conclusions, which without some established rule would be found in most men, though of excellent parts and reason, and agreeing in common notions (Hale, 2017, p. 163).

Hale thus attributes in practice a form of priority to the artificial reason of the common law, because its reliance on the experience and wisdom accumulated over the years in law enables it to determine aptly the general notions of justice contained in natural law. He renounces making the common law flow directly from natural law: even though the common law may correspond in some respects and cannot be contrary to natural law, it follows its own form of customary logic.

Hale's defense of the practical wisdom specific to common lawyers is based in fact on a severe criticism of the capacity of theoretical wisdom (of moral philosophers, theologians and such) to shed light on the practice of law. Such scholars, who are used to reasoning from general principles, are too detached from common experience to understand what is required by the law in particular cases:

> [...] those men that have great reason and learning, which they gather up of casuists, schoolmen, moral philosophers, and treatises touching morals in the theory, that soar in high speculations and abstract notions touching justice and right, and as they differ extremely among themselves when they come to particular applications, so [they] are most commonly the worst judges that can be, because they are transported from the ordinary measures of right and wrong by their overfine speculations, theories, and distinctions above the common staple of human conversations (Hale, 1924, p. 503).

The artificial reason of the common law is, according to Hale, inseparable from long studies and experience of human affairs and "conversation between man and man" (Hale, 1924, p. 503), in other words, from the particular reason that is in practice *shared* in the English community.

In short, even though the common lawyers of the classical era did not reject the general theoretical framework of classical natural law, their understanding of law took distance from it to focus on the form of rationality internal to England's custom. They did not abandon the in-principle priority of natural law, but turned away from the general or theoretical coherency[6] associated with it, and favoured a more local, effective form of consistency that was more likely to correspond to established practices in England and lead in practice to the convergence of the judgments (Postema, 2002b, pp. 592-594; Postema, 2002a, p. 180). The common law has a form of reason that is first and foremost customary, and it is the proximity between the law and the content of concrete social interactions that Hale sought to point out when he associated the common law's rea-

[6] However, many common lawyers, including Fortescue, St. German and Francis Bacon, showed interest in the most general maxims of the common law, and the artificial reason of the common law can be read in a way that makes it more centred on its general consistency and systematicity. For example, this is what Mark Walters does when he takes inspiration from John Dodderidge, whose thinking he links with Dworkin's later interpretive approach (Walters, 2008, pp. 251-254). It is, however, important to see that even this way of understanding the artificial reason of law is significantly different from the classical theory of natural law because it refuses to give natural law a major role that would be outside the common law and able to limit the latter's purview (Burgess, 1992, pp. 42-43, 251).

son with "the common staple of human conversations" (Hale, 1924, p. 503).We will now see how Waluchow similarly finds in shared practices and modes of reasoning the foundation for his theory of judicial review, but also how his particular understanding of the common law method, while encouraging moderation in the interpretation of charter rights, leads him to attribute more importance to theoretical wisdom than in the classical conception.

III. Constitutional morality

Before examining Waluchow's notion of constitutional morality and how it weaves together established practices and reason, it useful to remind that Waluchow's theory of judicial review can generally best be described as an attempt to respond to the criticisms that were levelled at the practice of judicial review in the last decades of the twentieth century, and in particular to respond to Jeremy Waldron's criticism (Waluchow, 2007, p. xi).[7] Waluchow indeed considers Waldron to have formulated the most powerful critique of judicial review when he explains that judicial review cannot be grounded in a moral theory that is immune to disagreements in the circumstances of politics and argues that is possible that judicial protection of rights impedes democratic self-government (Waluchow, 2007, pp. 123, 154; Waldron, 1999). Waluchow proposes to get around Waldron's objections by showing that judicial protection of charter rights, when properly understood as the implementation of a community's constitutional morality, is a reasonable response to the problems raised by the existence of disagreement in the circumstances of politics. Central to Waluchow's argument

[7] The first major article published by Waluchow on judicial review, which was the bedrock for his book *A Common Law Theory of Judicial Review*, was "Constitutions as Living Trees: An Idiot Defends" (2005) , and its title was in response to Jeremy Waldron. In his criticism of judicial review, Waldron argued that it is foolish to try to understand the phenomenon of judicial review on the basis of the image of Odysseus tying himself to a mast to resist the sirens. Doing so makes one an idiot because of the insurmountable disagreement about rights in society (Waldron, 1999).

is the idea that human beings always have a limited understanding of rights and that their moral myopia results in the government passing laws that necessarily sometimes violate rights (Waluchow, 2007, pp. 214, 215, 243). In this context, it is entirely reasonable and prudent for judges to ensure the protection of rights. When charter rights are understood and developed in a case-by-case manner, with a view to achieving the overall coherence that is characteristic of the common law, then the practices and values of a community and their evolution can be captured more faithfully than by legislation alone (Waluchow, 2007, pp. 183, 218-219). In other words, if one looks at judicial review from a common law stance and based on the metaphor of a living tree, it can be seen as a constantly renewed attempt to express the social life of a democratic community appropriately, rather than as the external imposition of rigid limits on government action.

The common law method to which Waluchow turns in his effort to explain and justify the practice of judicial review allows for an understanding of the nature of rights that is different from the one typically advanced by advocates of judicial review. Rather than seeing rights as deriving from an abstract or ideal morality, the interpretation of which can be debated depending on individuals' preferences, the common law method enables to see them as deriving from the constitutional morality of a community, that is, from the practices, consensuses and beliefs that are established in the law of that community. We propose to explain how Waluchow's notion of constitutional morality weaves together custom and reason by showing how it combines elements of Hart's legal positivism and Dworkin's theory of law as integrity.[8] We will show that, in the end, constitu-

[8] The effort to find a middle ground between Hart and Dworkin indeed defines profoundly Waluchow's understanding of the law and it visible both in his general theory of law and his theory of judicial review. While Waluchow does not directly explain the relations between his general legal theory, whose general outlook certainly remains descriptive, and his common law theory of judicial review, there are important continuities between the two and it is enlightening to view how Waluchow's reflection on judicial review is anchored in the broader intellectual undertaking that he began in the 1980s. The first period of Waluchow's intellectual production aimed at formulating a general theory of law inspired by Hart and able

tional morality refers to the coherence that can be discovered in existing law, but that it is also influenced by the rationality of a moral theory external to law.

1. *Customary rationality enshrined in law*

Waluchow defines the notion of constitutional morality in opposition to both the idea of ideal morality and the idea of positive morality (Waluchow, 2008, pp. 65-67; Waluchow, 2009, pp. 154-155; Waluchow, 2011, pp. 1034-1036). He explains that the constitutional morality of a community is neither simply ideal nor simply positive, but a bit of both. He begins by rejecting the idea that the criteria to which judges refer when deciding cases involving charters of rights are derived solely from some form of rational and universal moral truth. Ideal morality is subject to too much uncertainty and too much disagreement to be referred to without involving the personal preferences of an interpreter. He concedes to Jeremy Waldron that political disagreement cannot be resolved by simply resorting to some moral theory. It would be unwise to rely primarily on such a source to understand rights because judges do not have privileged access to moral truth, and it would be arbitrary to give their views on the subject any kind of precedence. Waluchow also

to accommodate some of Dworkin's important intuitions. His book *Inclusive Legal Positivism* sought to explain how Hart's legal theory could respond to Dworkin's critique and even incorporate a significant part of Dworkin's interpretative method (Waluchow, 1980; Waluchow, 1994). Waluchow shows in his general theory that Hart's notion of rule of recognition (and, more generally, of secondary rules) roots law in the practices and beliefs that are shared in a community and makes it possible to think about what courts do in a satisfactory way. Waluchow proposes from the outset a theory of judicial decision influenced by the classical common law and points out a certain affinity between Hart's legal positivism and the common law method he proposes (Waluchow, 1994, pp. 232ff). He also in his early works drew attention to the affinity between inclusive legal positivism and a liberal or activist vision of constitutional interpretation in the context of charter of rights (Waluchow, 1991).

Waluchow's common law theory of judicial review, elaborated at the turn of the century, during what could be called the second period of his theoretical production, has been marked by an effort to develop the theory of adjudication (and interpretation) that he sketched out during his first period. He then builds on the affinity he had already pointed out between inclusive legal positivism and common law interpretation, and he develops it in *A Common Law Theory of Judicial Review: The Living Tree*.

rejects the possibility of identifying rights with the mere positive morality of a given community, i.e. with the opinions and beliefs generally received in the community. In modern, multicultural, liberal societies, opinions and beliefs are very diverse and sometimes as much in dispute as ideal morality. Moreover, positive morality often defeats the purpose of charters of rights, namely the protection of vulnerable individuals and minorities, which means that rights cannot be reduced to a community's received morality without risking making them arbitrary or meaningless.

The constitutional morality of a community must instead be seen as a composite of positive and ideal morality. It requires abandoning the exaggerated (and in some ways twin) promises of the ideal and the positive in order to seek a middle way, a kind of in-between, with more modest claims. He returns to his reflections on inclusive legal positivism and finds in law's social and institutional anchoring (Waluchow, 1994, pp. 80-81, 107-113, 180-181) the element that makes it possible to discover rights. The constitutional morality of a community must be seen to come from the fundamental beliefs and convictions that are expressed in the social forms and practices of a community, and that have been "drawn into the [constitutional] law via the rule of recognition and the law it validates" (Waluchow, 2007, p. 227; see also Waluchow, 2009, p. 155). This understanding of rights, like his more general understanding of law, is influenced not only by Hart's theory of law, but also by Dworkin's.[9] The constitutional morality of a community corresponds to what Dworkin refers to when he speaks of the moral or political theory that is presupposed by the existing law and institutions in a community. It refers, in other words, to the form of coherence or rationality that can be discovered in existing law and by means of which it can be interpreted.

[9] The notion of constitutional morality also evokes Dicey's thought, although Waluchow does not recognize Dicey as having any special influence on his vision of the notion. Waluchow agrees that similarities could be drawn between his notion of constitutional morality and the ideas developed in work by Melvin Eisenberg, Christopher Eisgruber and Harry Wellington, but he does not recognize those authors as having influenced his own thought (Waluchow, 2007, p. 226).

However, Waluchow rejects, as in his general theory, certain aspects of Dworkin's theory of interpretation. He considers the rationality embedded in law to be intimately associated with the contingent practices and habits of a society and rejects the idea that the discovery of this rationality requires the personal adherence of the interpreter (See *a contrario* Dworkin, 1977, p. 128; Postema, 1987, pp. 288-289, 296-297), which allows him to remain more faithful to Hart's view. For Waluchow, the constitutional morality of a community refers to the moral beliefs that have been incorporated in the law through the rule of recognition, which, as Hart explained, is a form of social rule, that is intimately linked with social practices (Waluchow, 2007, p. 227; Hart, 1994, p. 101, 109-110, 255). The reference to the rule of recognition provides a more decisive link between constitutional morality and a conventional or customary origin.

Waluchow praises the ability of constitutional morality to espouse the reason that is shared in a community and to encourage consensus building on rights issues (Waluchow, 2007, p. 238). He rejects Dworkin's arguments against Hart's rule of recognition concerning consensus to which people adhere mainly because they are largely accepted (Hart, 1994, p. 267) (and Dworkin's corollary reduction of consensuses to those that are based on individuals' genuine beliefs (consensus of independent conviction) (Dworkin, 2006, p. 196)). Waluchow points out: "Law is, after all, a social institution, based in large measure on basic conventions and shared understandings of the sort highlighted by legal theorists of all stripes." (Waluchow, 2007, p. 238) He remains committed to Hart's vision when he explains that convergence in judgments and beliefs is not only an essential condition for the very existence of law, but also one of the most important goals pursued by law. The fact that reference to constitutional morality helps to foster shared understandings among judges charged with applying the law and between judges and society as a whole is one of the key reasons for embracing his common law theory of judicial review.

With the notion of constitutional morality, Waluchow also seeks to associate the rule of recognition and common law modes of reasoning. He draws an analogy between constitutional morality and the principles embedded in the common law: constitutional morality "is the morality actually embedded in social and legal practices in the way in which principles of corrective justice are embedded in our tort law". (Waluchow, 2007, p. 227; Waluchow, 2009, p. 156; Waluchow, 2011, pp. 1036-1037) Such a description of constitutional morality, which links it with the coherence that can be observed in the law, allows it to be distinguished from the mere moral opinions of a community (its positive morality) without, however, having to involve directly some form of moral truth (or an interpreter's personal opinion about moral truth): constitutional morality is inseparable from the accepted rule of recognition in a community, and its origin is social or customary before being ideal (Waluchow, 2007, p. 227; Waluchow, 1994, pp. 107-113, 180-181). Constitutional morality, like the artificial reason of the common law, claims to be first rooted in the practices and institutions of a community and then confirmed by the test of time (Waluchow, 2008, p. 91; Waluchow, 2009, p. 157):

> A community's constitutional morality is, after all, the product of much moral and legal experience, longstanding traditions, and social consensus. In other words, it is the product of sustained efforts on the part of a great many people, each pursuing a form of largely bottom-up, case-by-case reasoning about issues of political morality for which the common law is applauded. (Waluchow, 2007, p. 238)

Constitutional morality is thus based on the accumulated reasoning of countless individuals over the course of a community's history, the sedimentation of which has allowed the formation of a particular rationality well suited to the community's social life. It comes from the wisdom that emerges over time from the study of particular cases and that makes it possible to formulate law that

corresponds to the expectations and needs of the members of a community.

The proximity of constitutional morality to the life and consensus specific to a community, that is, the fact that the principles contained in a constitutional morality derive from a community's long-held practices and beliefs, makes that constitutional morality superior both to the products of individual natural reason and to those of ideal reason. Constitutional morality is indeed closer to the ideal for a given community than moral truth itself because it does not depend only on one individual's choice but refers instead to a kind of wisdom inscribed over time in the established practices of the community. Waluchow's argument rests on a critique of the myopia of individual natural reason that is reminiscent of that seen in the classical conception of the common law. Individual judges, like legislators, can often be wrong. They "are not philosopher-kings with a pipeline to moral truth" (Waluchow, 2007, p. 226). Conversely, the fact that constitutional morality is informed by the experience and judgment of a very large number of individuals over time gives it an important advantage in determining what is appropriate in a given community.

2. *The reflection of social consensus*

Waluchow grounds constitutional morality firmly in the custom and practice of a community, but at the same time he invites us to discover the deeper coherence at work in them and which makes it possible to overcome the disagreements that sometimes arise in practice. He is, as we have just seen, enthusiastic about the capacity of constitutional morality to generate consensus about rights, and he considers that the picture painted by critics of judicial review, such as Jeremy Waldron, of disagreements about rights is exaggerated (Waluchow, 2007, pp. 221–222 and 228–229). While not denying that there are some very difficult disagreements about rights issues, such as the ones surrounding abortion, Waluchow points out that most disagreements about rights are less profound

than they appear to be when one takes the trouble to examine them carefully. One can often, he argues, discover something like what Rawls calls "overlapping consensus" about rights. To begin with, members of a society generally agree on the general principles of justice, even if they do not always agree on their concrete implications. Next, even when they disagree on principles, they often agree on what should be done in practice. "Common ground can exist in the absence of an articulated consensus and in the presence of radical disagreement about all sorts of questions." (Waluchow, 2007, p. 228) These remarks apply both to pluralistic and multicultural communities, such as the United States or Canada, and to a community of communities, such as the European Union, where a broad base of shared values, as well as important consensuses about their practical consequences, can be identified upon close examination (Waluchow, 2012, pp. 193-194, 199-200 and 207-208).

For Waluchow, the apparent disagreements that agitate public opinion should not obscure the deeper or implicit consensuses in a community. In this regard, he draws an important distinction between mere moral opinions and genuine moral commitments (Waluchow, 2007, pp. 223-224; Waluchow, 2008, pp. 72, 74 and 75; Waluchow, 2012, pp. 202-203). Genuine moral commitments are distinguished from moral opinions in that they have been examined critically to ensure that they achieve what Rawls calls reflective equilibrium. Waluchow considers that an ongoing requirement of moral life for both individuals and communities is that they subject their views to rational scrutiny to ensure internal consistency. This means verifying that the specific judgments of a person or community are in harmony with each other and with the more general principles that the person or community uses as guides for action. Sometimes a person or community's judgments are in "evaluative dissonance" with respect to that person or community's genuine moral commitments. For example, one may realize that hiring only men as firefighters contradicts a deeper commitment to equality. These deeper commitments are discovered through an ongoing

effort to achieve consistency among judgments, and they provide common ground for people to "discover that they agree on, or are committed to agreeing on, much more than they thought they did" (Waluchow, 2012, p. 208; Waluchow, 2007, p. 224; Waluchow, 2011, pp. 1039-1040; Waluchow, 2013, p. 209).

Waluchow suggests that the distinction between moral opinions and genuine moral commitments be used to understand the operation of judicial review, noting that the criteria by which judges assess the validity of laws are among the genuine moral commitments that relate more specifically to the constitutional practices of a community (Waluchow, 2007, pp. 224-227). When judges apply charter rights, for example, they seek to discover the genuine constitutional moral commitments of a community and to achieve a reflective balance between those commitments and the community's moral views. For Waluchow, when the critique of judicial review emphasizes the distance between a community's simple moral views and judicial judgments, it fails to take sufficient account of the fact that judges implement the deeper values to which communities have committed themselves through their constitutional law and practice. Waluchow gives the example of the ban on same-sex marriage (stemming from the requirement that marriage be between two people of the opposite sex). In his view, even if this prohibition is consistent with certain widespread moral views in Western societies, it clearly contradicts their genuine constitutional commitments (Waluchow, 2009, pp. 157-158; Waluchow, 2008, pp. 73-74; Waluchow, 2007, pp. 224-225). When, for example, Canadian courts recognized the right of homosexuals to marry, they did not rely on the (conflicting) moral views of Canadians on the subject, but rather on the long history of defending equality in Canadian constitutional law. In other words, the constitutional morality of a community does not reflect mere moral consensus, but refers to deeper moral commitments. It cannot be discovered by opinion polling or other forms of sociological analysis, for it is inseparable from the effort to discover the coherence that is embedded in existing constitutional law. Thus, according to Waluchow, when judicial

review declares otherwise popular laws invalid, it makes it possible to give precedence to the authentic desires of a population, those that correspond to the population's considered commitments and that are inscribed in received practices, rather than to transient, ill-considered desires.

3. *The contribution of ideal morality*

As we have just seen, constitutional morality refers to the internal rationality of a community's practices and law, but it seems that constitutional morality also bears some relation to ideal morality. Indeed, the charters of rights that help define constitutional morality in contemporary liberal democracies generally refer to requirements that are rational and universal in scope. This raises the question of what role these requirements are called upon to play and of how a method that focuses on the social and institutional roots of constitutional morality can be reconciled with the ideal criteria to which such charters refer (Waluchow, 2012, p. 195).

Waluchow is not very explicit when he discusses this aspect in *A Common Law Theory of Judicial Review*, especially when he tends to insist that in constitutional morality it is the commitments or choices that are genuine rather than the content of the commitments (Waluchow, 2007, p. 224; Waluchow, 2008, p. 72; Waluchow, 2012, pp. 202-203). However, the critical discussion that followed the book's publication, in particular Nathalie Stoljar's criticisms, led Waluchow to later clarify his position on the ideal scope of constitutional morality (Stoljar, 2009).[10] He acknowledges that the critics pointed out an important difficulty in his thinking, and in the articles published after *A Common Law Theory of Judicial Review* he explains more clearly that constitutional morality does

[10] In her critique, Stoljar insists on the tension that exists between the descriptive goal of the notion of constitutional morality, which is supported by the positivist sources of Waluchow's thought (and which is inseparable from his effort to show that judicial review is compatible with democracy) and the normative scope of the common law method that he proposes, tension that shows the influence both of Hart's writings on indeterminate cases and of Dworkin's theory of interpretation on his thinking (Stoljar, 2009; Miller, 2007, p. 299).

not concern only the internal consistency discovered in the practices of a community, but is also influenced by rational and universal moral requirements, to which it seeks to give a concrete translation (Waluchow, 2009, p. 160):

> [Constitutional morality is] a community's positive morality with a critical bite—the bite provided by RRE [the requirement of reflective equilibrium], the norms of Platonic political morality [universal and rational moral truth], and the well-founded, particular determinations of those norms made by the officials and official bodies of that community (Waluchow, 2012, p. 215).[11]

The fundamental consensuses that define the constitutional morality of a community are thus seen by Waluchow not only as carrying a form of coherence patiently built up over history by the accumulated judgments and reasonings of countless people, but also as bearing an ideal morality and the interpretations it has received. When judges apply the constitutional morality of a community, they give up implementing their personal vision of the requirements of ideal morality and turn to what is accepted in their society, but Waluchow considers that their goal is still to implement the vision of ideal morality that can be attributed to that society: in other words, they have to rely on "their best judgments as to the relevant democratic community's best judgments concerning the demands of Platonic moral truth" (Waluchow, 2012, p. 206; Waluchow, 2011, p. 1038). Constitutional morality thus involves to some extent transposing the requirements of an external ideal morality into the law of a particular community.

It is not surprising that Waluchow turns in this context to the thought of Thomas Aquinas to explain the nature of the criteria that are applied by judges when referring to a community's constitutional morality. Indeed, Waluchow draws on Aquinas' developments on the "determination of common notions" (or generalities)

[11] Waluchow generally refers to the idea that there is a universal and rational truth in morality as "Platonic morality".

of natural law to explain how the principles of universal and rational morality that are included in constitutional morality relate to the social life of communities (Waluchow, 2011, p. 1037; Waluchow, 2012, p. 195; Waluchow, 1994, pp. 107-112; Waluchow, 2003, p. 116). Aquinas explains that natural law gives rise to two types of requirements (Aquinas, 1984, pp. 597-602). First, there are those that flow from natural law by a kind of logical necessity, such as the prohibition against murder. However, natural law remains very general and does not explicitly provide for appropriate actions in all contingent circumstances of practical life. It does not, for example, specify the appropriate punishment for a murderer. The "logical" requirements of natural law must thus be supplemented by a second kind of requirement, which arises from human determinations of the "common notions" or generalities contained in natural law. Implementing natural law requires that persons or institutions make its meaning more precise and help to complete it. Natural law can then give rise in practice to a great variety of laws, all of which may be compatible with its general prescriptions. In this way, Aquinas recognizes the important influence of communities' own experience on the concrete definition of natural law.

Waluchow takes a view similar to Aquinas' of the general morality embodied in charters of rights. He insists that the rational universal morality of rights provides only a blueprint or outline, which often fails to guide action on its own and has details missing that must be worked out by human institutions, especially judicial ones (Waluchow, 2007, pp. 233-234 and 241; Waluchow, 2008, p. 83; Waluchow, 2009, p. 152; Waluchow, 2012, p. 194). The morality embodied in charters of rights is largely indeterminate or underdetermined. In other words, it can give rise to a variety of "determinations" that are consistent with it. For Waluchow, the process by which charters' general morality is determined or translated into practice does not depend simply on the rationality of that morality, but also refers to a community's specific experience. The need to elaborate a universal and rational morality of charters of rights that harmonizes with the particularities of the social, political, economic, historical

and cultural life of a community may even lead to different determinations of the same morality within a federal state. Waluchow considers, for example, that the fundamental rights recognized in the *Charter of Fundamental Rights of the European Union* (2007/C 303/01) may sometimes be determined differently in different member states. It is not necessary that the rational and universal morality included in the *Charter of Fundamental Rights of the European Union* always be applied in a uniform manner, and this is in fact recognized by the margin of appreciation doctrine (Waluchow, 2013a, p. 1047). The question of whether, for example, freedom of expression is compatible with a prohibition against conspicuous religious symbols in the public space could thus be answered differently in different member states, without those states having to give up their common values (Waluchow, 2012, pp. 210-212). There is sometimes more than one legitimate way to understand rights and duties, and "different communities can render different determinations and yet be doing so in observance of one and the same, ie, a common, set of values" (Waluchow, 2007, p. 211).

4. *Affinities with liberal morality*

The influence of community-specific social experience on the definition of constitutional morality raises the possibility that constitutional morality does not contribute to the primary purpose that Waluchow attributes to charters of rights, namely, the protection of minorities and vulnerable individuals from the ever-potentially tyrannical majorities. Waluchow acknowledges that the notion of constitutional morality, because it refers to a community's view of morality and in some way reflects the moral perspective of the majority, is open to this criticism (Waluchow, 2007, pp. 236-237; Waluchow, 2008, pp. 88-90). Although constitutional morality does not refer simply to the majority moral views of a community, because it assumes that these views undergo the test of reflective equilibrium and are related to the genuine moral commitments of that community and their particular determinations, it can sometimes conflict with the inter-

ests of minorities and vulnerable individuals. Waluchow thus admits that his common law conception of judicial review remains in principle independent of the general morality usually associated with liberalism and that it may serve other moral visions depending on the social context. The constitutional morality of some communities may even encourage the oppression of certain groups, as was the case in South Africa during the apartheid era. In this respect, Waluchow remains consistent with the characteristic idea of legal positivism that law can serve questionable moral ends and become a tool of domination. Despite the rapprochement he proposes between law and morality, he ultimately maintains the idea of their possible separation: "The existence of law–including that part of our law which is our constitutional morality–is one thing; its merit or demerit quite another thing entirely" (Waluchow, 2008, p. 90). On his view, the constitutional morality of a community is not intended to replace personal morality, in the name of which it is always possible to oppose and criticize the prescriptions of law.

Waluchow hastens to add, however, that this problem does not arise in practice, since the constitutional morality of all Western democracies rejects the oppression of minorities and vulnerable individuals. The constitutional moralities of Western societies always include, whether through charters or judicial decisions, the protection of the rights of minorities and vulnerable individuals. Thus, in the context of liberal democracies, judges who seek the coherence that is embedded in the law of a community and apply its constitutional morality "will *inevitably* be led to protect minorities from the tyranny feared by Mill" (Waluchow, 2008, p. 89 (our emphasis)). The common law conception thus in effect allows judicial review to be intimately associated with the liberal morality embodied in charters of rights, and in this it can be a "powerful vehicle for moral good" (Waluchow, 2007, p. 237).

It should also be noted that while Waluchow points out that the general morality that is included in charters of rights is often "underdetermined", he also recognizes that it is not entirely indeterminate (Waluchow, 2012, pp. 210, 214). The general morality

of charters of rights often leaves some latitude to those charged with implementing it, but it also clearly precludes certain choices that would prove inconsistent with it. First, the general morality may require uniform determinations, despite the social differences between the communities in which it applies. One can imagine, for example, that a federal state's commitment to the economic integration of its members might make it mandatory to apply identical measures in certain areas. Second, as in Aquinas' understanding of natural law, the general morality embodied in charters of rights sometimes provides answers that leave no room for determinations. For example, while the notion of freedom of expression does not clearly say whether to prohibit conspicuous religious symbols in the public space, it is clear that it is opposed to laws that prevent political dissent. Thus, in Waluchow's view, a community's social life and customs often influence the definition of rights, but rights always remain in a certain sense pre-political, and their meaning derives from almost natural requirements (or at least from requirements that are independent of the received practices in a community) (Waluchow, 2013a, p. 1047). There is, in other words, a part of the content of constitutional morality as it exists in Western democracies that is less directly related to the communities' own experience and its internal coherence than to the universal rationality of liberal morality contained in charters of rights.

Finally, according to Waluchow, the rights contained in charters have contributed to some moral progress, and we can hope that they will continue to render us more enlightened (Waluchow, 2007, p. 159). Despite our epistemological limitations and the difficulty of knowing the right moral answers, it must be acknowledged that progress is possible with respect to knowing what is good or true in the moral realm. The example of slavery, which was once recognized as morally acceptable and is now unanimously denounced, shows this clearly. Waluchow thus sees the liberal morality contained in charters of rights as the result of a process that has, over time, brought Western societies closer to the truth in the moral realm, and a certain implicit philosophy of history could be attrib-

uted to him, even though he also recognizes the contingent nature of the choices that are made by societies and that can change the constitutional morality of a community.

5. *Discretion and democracy*

Waluchow attempts to show that constitutional morality can be discovered by judges through careful study of a community's practices, but he is repeatedly confronted with the problem of the role played by interpreters in developing that morality, especially in hard cases. There are questions about which communities are deeply divided and where constitutional morality does not allow for a definite or single answer. Similarly, the notion of equality may receive various determinations or translations in practice that are consistent with its general principle and with the interpretations it has received in various given communities in the past. In such cases, Waluchow recognizes, as we have pointed out, that judges charged with implementing constitutional morality are not simply applying a criterion they discover but are engaging in what Aquinas calls the determination of common notions, and thus participating in some way in the construction or creation of constitutional morality (Waluchow, 2013b, p. 210; Waluchow, 2000, p. 67).

These cases raise a crucial difficulty for Waluchow, who explains in his reply to Waldron that judges' application of constitutional morality is a democratic practice and that it allows the people to remain the author of the criteria that govern them. To the extent that judges refer to constitutional morality when reviewing the constitutionality of laws, he argues, they are not speaking for themselves, but are in some way implementing the wishes of the community at large. They apply the criteria that are defined by the members of society and their authorities over time, and this remains compatible with democracy: judicial review is part of a set of measures, such as representation, that are not a direct expression of the popular will, but serve that will. The social and customary anchoring of the secondary rule of recognition is placed, in Waluchow's theory, in ser-

vice to an argument for the democratic character of the law. However, the fact that there are cases in which the judge cannot refer to an existing or sufficiently determined consensus when assessing the validity of laws makes it problematic to claim that judicial review is a democratic expression of popular aspirations.

Waluchow goes to great lengths to show that the process by which judges participate in the development of a community's constitutional morality is neither merely arbitrary nor subjective. He explains that, in cases where the law remains indeterminate, judges must draw on the common law method and proceed on a case-by-case basis, gradually developing the law in a manner consistent with past decisions (Waluchow, 2013b, p. 209). Waluchow wants to show that the common law method, even though it is associated in the contemporary world with judge-made law, allows for a neutral, impartial description of the law, which he believes meets the condition for it to remain democratically acceptable. He puts forward several arguments to try to show how judicial judgment remains constrained by a framework even when it participates in the development of constitutional morality.

Waluchow begins by arguing that judges' construction of constitutional morality can remain democratically legitimate as long as they refer only to justifications that can be accepted by all as reasonable. To the extent that judges refer only to what Rawls calls public reasons in cases where the constitutional morality of a community is indeterminate and develop constitutional morality according to the common law method, they are, according to Waluchow, acting in a democratically legitimate manner (Waluchow, 2013b, pp. 211-212; Waluchow, 2011, pp. 1043-1044). Even those who disagree with a court's construction of constitutional morality can understand what motivated it, and they can continue to believe that the choices judges make on behalf of the people are legitimate from a democratic point of view.

Waluchow later explains the idea that democratic legitimacy can be respected so long as judges adopt what he calls a detached perspective. The discretionary construction of morality that judg-

es engage in when constitutional morality remains undetermined may be democratically acceptable if judges rely on the community's view of what is morally ideal rather than on the personal perspective of an interpreter (Waluchow, 2015, pp. 25-26, 36-37, 38-40). Most judges see their duty as to apply the law as it is, not as it should be from their perspective. The effort to apply the law as it is implies, according to Waluchow, the requirement to employ the vision of ideal morality accepted by a particular community in its legal practices, which cannot be reduced either to the personal morality of the judge or to ideal morality in itself. Waluchow considers that this shows that the constructive interpretation that judges engage in when developing the constitutional morality of a community may well be conceived as democratically legitimate.

Finally, Waluchow adds that a written constitution is often very indeterminate, but can be incorporated into constitutional morality in a democratic way if it is interpreted by judges according to the ordinary meaning of the words it contains (Waluchow & Stevens, 2016, p. 276). Interpreting the written constitution according to the ordinary meaning of the words it contains ensures that the definition of constitutional morality is not influenced only by the judicial authorities, and that the citizens of the democratic community also participate in some way. Reference to the current meaning of words ensures that the understanding of the written constitution remains connected to the social and moral life of the community and that the common law constitution that emerges from the work of judges remains in step with developments in the democratic community.

IV. Affinities and differences with artificial reason

Having studied more closely Waluchow's notion of constitutional morality, we can better appreciate how it relates to the classical notion of artificial reason. Waluchow's main emphasis is on the practical virtues of the common law method, that is, on the special competence of judges trained in that tradition to apply and de-

velop the law in a manner appropriate to the life of a community. However, as we have started to show, there is a deeper connection between his theory and the classical idea of artificial reason, which is visible in their shared emphasis on the central role played by consensus over time in the knowledge of the law and on the limitations of individual natural reason. Waluchow admits that there are some affinities between constitutional morality and classical common law, but he also recognizes the originality of the notion he develops (Waluchow, 2009, p. 159). We propose to explain this originality by the fact that the elements of constitutional morality reminiscent of artificial reason are situated within a conceptual framework marked by both Hart's legal positivism and Dworkin's critique of Hart, in which the polarity between the authority of government and the rights of individuals is as important as the shared practices of a community. This leads Waluchow, in his attempt to build on the customary dimension of the law to establish the democratic character of judicial review under charters of rights, to give a more abstract scope to the constitutional morality that is supposed to represent the wishes of the members of a society and to attribute a role to the judge a very imposing role. We will first summarize the affinities that exist between constitutional morality and artificial reason, and then explain at greater length the differences.

1. *Affinities*

As we have seen, Waluchow's theory of judicial review emphasizes, like classical common law jurisprudence, the customary and institutional origin of the limits law poses on government action. The notion of constitutional morality that he develops resembles in many respects the notion of artificial reason when it designates the particular form of rationality that has been sedimented over time in the legal practices of a given community and reflects the consensuses that have emerged through the cumulative efforts of a very large number of people (and which are for this reason more suited to the proper life of a community than would be ideal morality itself).

Constitutional morality makes possible, like the notion of artificial reason, an understanding of statutory law from the background of shared practices and beliefs that have crystallized in the law of a society. The insistence on the epistemological limitations of individual natural reason for knowledge of law is also an important aspect bringing Waluchow's thinking closer to the classical view of the common law[12]. Waluchow's wariness towards individual reason is particularly visible in his effort to detach the law from the private opinions of interpreters and to associate it instead with a perspective defined by the shared practices and beliefs of a community. This leads him to distinguish his position from that of Dworkin, notably from elements of Dworkin's critique of the rule of recognition. First, he counters Dworkin with the idea that law is not defined primarily by the fact that it is a "contested concept", by the fact that it generates a conflictual and abstract discussion about justice (Dworkin, 1986, pp. 11-15; Dworkin, 2006, p. 221), but by the important consensuses on which it is based and without which it cannot exist. By placing a broad understanding of the rule of recognition (and, more generally, of secondary rules) at the heart of his vision of law, Waluchow recaptures an important part of the classical common law idea that law is fundamentally based on a social and customary background. He recognizes that the principles at work in law are subject to discussion, and sometimes to disagreement, but the central role he gives to the shared experience and practices of authorities and community members allows him to ground the form of rationality he sees at work in law quite firmly in the particular institutions of a community. The notion of constitutional morality thus partially corrects the tendency of Dworkin's legal theory to understand the social and customary dimension of law from an individual's abstract moral perspective. Indeed, Dworkin explains that the constraint exerted by the dimension of *fit* with existing legal materials in the interpretation of law as integrity is not mechanical,

[12] The theories of Waluchow and David Strauss overlap on this point: "The first attitude at the foundation of the common law is humility about the power of individual reason" (Strauss, 2010, p. 41).

that it is not the constraint of an « external hard fact or interpersonal consensus » (Dworkin, 1986, p. 257), but that it is itself a political judgment, part of a more general moral and political judgment, in which an idiosyncratic interpreter must try to provide the best justification for law (Dworkin, 1986, pp. 255-256). For Waluchow, law remains first and foremost a social or conventional phenomenon, and its coherence is deeply linked to the consensuses that have been inscribed in it over time. Careful study of the shared practices in a community is required to see what these consensuses are, and they can be described even without taking the perspective of a participant in the practice and without engaging in introspection. As we have shown, Waluchow goes to considerable lengths to show that the law, even in the most difficult cases, can be described in a relatively unbiased way, that is, that an interpreter can come to know it without essentially relying on his or her private opinions. He considers, like the classical common lawyers, that it is necessary in the knowledge of the law that the myopia of individual natural reason be corrected in light of an intersubjective social reason that has been sedimented over time in the law. Waluchow also explains, in line with the classical conception of the common law, that judges and jurists trained in the common law tradition are in the best position to identify the internal reason of the law, and he relies somewhat more clearly than Dworkin on their traditional professional knowledge to justify their superiority (Waluchow, 2007, pp. 235, 261). The ascendancy that Waluchow attributes to constitutional morality over popular morality and statutory law depends on the judges' own practices and expertise and is also to some extent reminiscent of the superiority of the artificial reason of the common law. The case-by-case approach of common law judges, with its characteristic back-and-forth between particular cases and the broader coherence that emerges from them, allows for a form of law to emerge that is especially attuned to the important opinions and beliefs of a community, while also respecting their deeper coherence.

2. *Differences*

Waluchow's effort to reconcile the contributions of Hart's and Dworkin's theories within a coherent understanding of law leads him, as we have just seen, to recapture important aspects of the combination of custom and reason that we find in the notion of artificial reason of the law. However, Hart's legal positivism and Dworkin's theory of law as integrity also influence Waluchow's thinking in directions that pull it away from the idea of artificial reason. Legal positivism's tendency to associate law with state authority and the propensity of Dworkin's interpretivist approach to understand law through the lens of a general moral theory introduce into Waluchow's vision of law elements such as discretionary decision and extra-legal morality, which contribute to transforming the meaning that elements influenced by the classical conception of the common law take on in his thought. In particular, they lead him to see the judge's role as being as much to search for internal coherence in a community's received practices as to carefully develop and apply to specific cases a general moral theory based on individual rights.

3. *The common law in service to popular sovereignty and rights*

The conceptual architecture of Waluchow's theory of judicial review is deeply influenced by legal positivism, and in some respects it remains marked by the association Hobbes established between law and authority in his uncompromising critique of the artificial reason of the common law (Hobbes, 1971). Hart's rule of recognition, while directed against Austin's emphasis on the sovereign's commands, retains a certain preference for authorities' point of view in defining law (Hart, 1994, p. 117). Governmental authorities retain a similar directive role in Waluchow's view. Constitutional morality, which refers to the principles that are incorporated into the law of a community through its rule of recognition, is defined in important ways by the authorities of that community. Waluchow explains that constitutional morality is called upon not only to reflect exist-

ing practices in civil society, but also to determine them and make them evolve (Waluchow & Stevens, 2016, pp. 275, 287). For him, in a well-functioning legal system, citizens must adapt their conduct to the constitutional requirements stated by judges. He also considers that a rift between the viewpoint defined by the authorities and the aspirations of the general population is always possible, and this is one of the reasons why he remains attached, even in the more normative part of his theory, to the idea of a possible separation between law and morality that is typical of positivist thought. It is true that Waluchow significantly attenuates the keen assertion of the authoritative character of law found in, for example, Raz, and associates law's authority more with the ability to influence the relative weight that actors give to the various reasons that motivate their actions than with the ability to radically override those reasons (Raz, 1985, p. 297; Waluchow, 1994, pp. 136-137). However, the second-order reasons given by authorities still take precedence over citizens' first-order (ordinary) reasons, and Waluchow never completely denies the idea that law has a strong authoritative dimension and could theoretically be entirely defined by the authorities. Waluchow's real sympathy for the perspective defined by established practices and existing consensuses is thus embedded in a theoretical apparatus that remains partly focused on state authority. As in the classical view, custom and shared practice provide the fundamental basis of the law and judges trained in the common law are best at formulating it, but Waluchow's theory also anticipates that authorities' custom and practice may radically override those generally accepted in society. The authoritative scope that he attributes to constitutional morality contrasts with the customary spirit of the classical common law.

In his understanding of the constitutional phenomenon, Waluchow also adopts the idea of a strong polarity between the power of government and the natural freedom of individuals, which originates in Hobbes (Hobbes, 1996, chap. 13-14) and is typical of the liberal tradition of thought. He contrasts the authority of government with popular sovereignty, which is based on the

rights of the individuals who are part of the people. The right of resistance that he recognizes, following John Locke, as belonging to the people testifies to the ascendancy in his thought that the members of society can ultimately exercise over the government and to the form of priority that should be attributed to their vision over that of their authorities (Waluchow, 2013a, pp. 1047-1048). For Waluchow, the individuals who make up the people possess a set of pre-political rights that circumscribe the laws that can be adopted legitimately (Waluchow, 2000, p. 61; Waluchow, 1989, p. 29). This background, inspired by liberal thought, considerably colours his relationship with the custom-based approach of the artificial reason of the common law. Waluchow turns to the method characteristic of common law judges in the hope of minimizing the gap that could develop between the rights of individual members of a community and the actions of government. The common law method thus comes into play for him as an addition or complement, after the government's capacity to act and the rights of individuals have been recognized (Waluchow, 2007, pp. 204, 215, 218). Waluchow refers to the approach of common law judges in his theory of judicial review with the stated aim of resolving the tension between democratic government and individual rights. He tries to show how these two elements can be reconciled towards a common end, namely the realization of the constitutional morality of a community. Waluchow wants to show that the common law approach can play the role of an intermediary between the popular will and the ideal of individual rights: the common law method facilitates the acceptance of the idea that people's aspirations are corrected by the work of judges by explaining that judges merely implement received practices, and at the same time this method makes it easier to accept the idea that judges must apply the rationality of individual rights by portraying that rationality as merely part of the received practices in a community. Such an endeavor deviates in many ways from the classical idea of artificial reason.

4. *The rationality of constitutional morality*

First, it can be noted that Waluchow's emphasis on the rights of individuals influences the form of coherence that judges are called upon to discover in existing law using the common law method. Law's particular form of reason refers in Waluchow's work as much to the wisdom accumulated over time in the law of a community as to a moral vision based on individuals' rights. He considers that constitutional morality can include the requirements of a rational and universal moral theory, since a community can choose to include them in its law. Waluchow adopts, with certain nuances, the idea found in Dworkin's theory of interpretation according to which one must seek to understand existing law from the general moral theory underlying it (Dworkin, 1986). In this way, he, like Dworkin, tends to understand the customary or institutional dimension of law in the light of moral or political philosophy, and this entails an ambiguous relationship with the pragmatic and theory-weary artificial reason of the classical common lawyers (Postema, 2002a). Waluchow is, however, more moderate than Dworkin with respect to the place of moral and political philosophy in the definition of law and he places greater emphasis on the central role played by shared practices. Significantly, Waluchow's theory of law never gives the justificatory or philosophical dimension of law such a prominent function that it entirely compromises the role played by shared practices and the institutional dimension (Waluchow, 2000, pp. 80-81). Indeed, Waluchow makes a considerable effort to show that constitutional morality derives from rules that always refer to broad consensuses and are not reducible either to the perspective of an individual interpreter or to a moral or political theory. Nor does he extol the philosophical ambition of judges in a way comparable to Dworkin (Waluchow, 2007, pp. 246, 267). Instead, he sees the theory underlying existing legal practices as always dependent on significant consensus and as capable of being described and applied in a way that remains mostly uncontroversial. In Waluchow's view, convergence in judgments becomes once

again not only an essential condition of law, but one of its most important goals.

The fact remains that, in both Waluchow and Dworkin, the search for internal coherence of the law according to the common law method leads in fact, in all Western democracies, to the implementation to a certain extent of a form of coherence that comes from a moral theory outside the law. Waluchow does not renounce the idea that law is defined by its social and institutional anchoring, but at the same time he recognizes a certain ideal scope for the elements that make up that anchoring. To get around the problem of theoretical disagreement raised by Dworkin, Waluchow ascribes to each of the Western democracies a social consensus that inevitably includes a moral theory centred on the rights of individuals: according to him, almost everyone agrees on the general rights that are part of charters of rights and on their desirability (Waluchow, 2007, p. 246; Waluchow, 2007a, p. 129).The shared practices that give shape to constitutional morality are also seen as a foundation for the ideal moral aspirations of the members of a society, which judges can then convert into a set of rules to be followed in everyday life. Waluchow's approach is based on the idea of a search for internal coherence in the shared practices of a society, but it also makes room for a scheme inspired by natural law, where the issue becomes judges' application of a general moral theory to particular circumstances.

It is true that the rationality carried by constitutional morality interacts with the experience specific to a community and takes on an "artificial" character or local colour when determined by the judges charged with implementing it. One of the greatest merits of Waluchow's theory of judicial review is precisely its insistence that the rationality of rights must be adapted to fit the established needs and expectations of a society. We may praise Waluchow for inviting a moderate reading of rights and for proposing a method of interpretation that encourages paying attention to the practices that are received in a community. It should be noted, however, that the way constitutional morality is defined is influenced greatly by the

light of the ideal, as evidenced by the symbolic and rational significance that Waluchow gives to charters of rights. For him, charters of rights are not simple confirmations of established law in a community, but have a higher status, which allows them to define the identity of a community in an important way and to make the exercise of governmental authority in a community more rational (Waluchow, 2007b, p. 245). In a way, Waluchow sees charters of rights as providing a general framework of rational scope that judges can then adapt to the specific social life of a community. He refers to the common law method to describe the process by which the abstract rights in charters are applied to particular cases: "I used the phrase 'bottom-up' to convey one of the ways in which the broad, abstract clauses of charters [...] are developed or particularized on a case-by-case basis by judges [...]" (Waluchow, 2009, p. 151) It has been suggested that such a method can better be described as "top-down" (Brand-Ballard, 2008). Under Waluchow's interpretation, judges apply and determine the general moral theory embodied in charters of rights in a manner analogous to that of the interpreter of the natural law in Thomas Aquinas.

The important weight given by Waluchow to the rationality of rights in understanding a community's legal practices thus contrast with the idea of artificial reason found in the classical conception of the common law. Waluchow's theory of judicial review, like Dworkin's view of law as integrity, encourages to some extent thinking about law in the continuity of moral and political theory (Dworkin, 2006, pp. 34-35, Dworkin, 2011, p. 5). The common lawyers of the classical era did not hesitate to assert that the common law corresponds to natural law, but they remained fairly focused on the practical issues before them and refused to venture into considerations of moral and political theory or philosophy, for fear of straying too far from the standards emanating from long-standing shared practices in a community.[13] Waluchow's common law con-

[13] As we have shown, the classical conception of the common law has a special relationship with the classical theory of natural law: there is, according to the former, a concordance between the common law and natural law, but they evolve on distinct and somewhat paral-

stitutionalism is not similarly insulated from the influence of moral and political theories. The common law method, as he understands it, remains subordinate to the general rationality of a theory centred on individual rights, recognized as a source of moral progress. Common law's prudent method allows this theory to be adapted to the practices received in a community, but it never fundamentally questions the general rationality that it helps to implement.

5. *A democratic morality?*

The common law approach also allows, according to Waluchow, the judicial protection of rights to appear as a natural extension of democratic government. For him, constitutional morality as defined by judges succeeds in representing the aspirations of a democratic community more adequately than legislation. The superiority that Waluchow attributes to common law judges in this task is based in part on their special ability to embrace the life of a community in their decisions and on their genuine openness to the practices and reasons that are shared in a society. The connection Waluchow seeks to make between the constitutional morality of judges and popular aspirations is reminiscent of the confusion in the classical conception of the common law between the common law and popular custom. This confusion refers to a real sensitivity among common lawyers to the views of the governed and reveals the fundamental dependence of the common law on shared practices in a community, but at the same time it implies a recognition of the superiority of court practices over popular practices. Waluchow returns to this idea, which fits well with the form of superiority of the secondary rule of recognition that he places at the center of his

lel planes. Despite the assertion that the common law and natural law correspond to each other generally, classical common lawyers jealously focussed on the study of English custom and avoided showing explicitly how it relates to natural law. The customary rationality of the common law had, for them, a form of priority in practice: it is not seen as subordinate to natural law. The classical common lawyers were rather suspicious of moral, philosophical and religious speculations that departed from common experience, and insisted on the shared character of the reason that animates the law (Postema, 2003).

understanding of law, and insists that judges, in defining constitutional morality, are better able to represent popular aspirations than elected officials. He is then led to define democracy largely as a set of shared habits and reasons and to relegate its more voluntary aspects to the background.[14]

Waluchow wants to reconcile democratic government and judicial protection of rights by turning to the common law method, but he can do so only because he largely identifies democratic aspirations with the ideal content he ascribes to constitutional morality, namely, individual rights. To the ordinary forms of social solidarity, which can be expressed in particular by means of representative institutions, Waluchow prefers the form of justice that derives from the judicial protection of rights and that allows individuals and minorities to assert their point of view against the existing social solidarities:

> In some situations, more is needed than compromise, accommodation, and "social solidarity." Oftentimes, the social solidarity in play works forcefully against the vital interests of disadvantaged individuals and minorities. Social solidarity, in the hands of an entrenched majority, can lead to social injustice (Waluchow, 2007b, p. 177).

[14] The example of how he proposes to understand written constitutions is illuminating in this regard. Judges form, according to Waluchow, a language community distinct from the democratic community at large, and they must, in their interpretations of the written constitution, attempt to follow the meanings that are attributed to words in ordinary civic conversation. In this respect, he draws on David Strauss, who explains that such an approach allows judges to build on the consensus that already exists in the population about a constitution. Unlike Strauss, who generally believes that judicial review of the constitutionality of laws has an anti-majoritarian purpose that is difficult to reconcile with democracy (Strauss, 2010, pp. 46-49), Waluchow believes that citizens participate in the definition of constitutional morality when judges interpret the written constitution based on the meaning citizens give to words in everyday conversation (W. Waluchow & Stevens, 2016). This example reveals Waluchow's tendency to adopt a rather particular definition of democracy. The meaning of words depends on usages, which have a rather strong inertia and change only slowly and gradually; in the end, this leaves citizens with little control over the definition of constitutional morality. Democratic government is defined, in his view, less as a population's adopting of laws to govern itself than as an ability to espouse the needs, habits and beliefs of a population, a task for which judges are better trained than elected officials.

Waluchow endorses the idea that cooperation between the members of a society presupposes the prior recognition of the rights of individuals and minorities (Waluchow, 2013a, p. 1040). For him, democracy therefore aims first at the implementation of certain moral values, and it takes on a meaning that is close to that which Dworkin gives to constitutional democracy. "Waluchow, following Dworkin, is also positing an idealized democracy where respect for rights is intrinsic to democracy itself; democracy means that the content of legislative decisions must adhere to certain core liberal values of respect for individuals' freedom and equality" (Sypnowich, 2007, p. 765; Stoljar, 2009, pp. 127-128).[15] Using a formulation reminiscent of Dworkin, Waluchow explains that the rights in charters are worth protecting because they contribute, "in ways consistent with [...] the demands of reason and morality, to the workings of a reasonably free, self-governing society which aspires to respect its members as rights bearers deserving of equal concern and respect" (Waluchow, 2007b, p. 246). As Christine Sypnowich says, in Waluchow, "distinguishing true, constitutional morality from erroneous, popular views of morality is a rather arbitrary affair, which has little to do with democracy and much to do with the liberal principles of philosophers" (Sypnowich, 2007, p. 762; Campbell, 2009, p. 20).

Waluchow moreover justifies judges' special role in his conception of democracy on the basis of their ability to respect the rationality of the theory of rights that is embedded in constitutional morality. For him, the superiority of common law judges in determining constitutional morality derives, as in the classical common law conception, from their training and expertise, but also from their independence and ability to respect the coherence of the principles they are charged with applying (Waluchow, 2007b, pp. 258, 264-265; Waluchow, 2007a, pp. 137-138). It is easier, in other words, for judges to identify and apply the law "as it is" rather than dis-

[15] Synopwich explains that seeking to resolve the difference between democracy and individual rights risks leading to a dilution of both democracy and individual rights (Sypnowich, 2007, pp. 764-768, 771-772).

torting it according to their wishes and the wishes of an electorate, making them more likely to respect the rights of individuals and minorities. Judges "aren't smarter than the rest of us, nor do they possess a degree of moral insight and sophistication surpassing that of the average citizen or legislator"(Waluchow, 2007b, p. 225; see also Waluchow, 2007c, p. 262) but they are nonetheless better able, for both professional and institutional reasons, to develop constitutional morality in a way that respects the speculative consistency of the rights it encompasses. In sum, Waluchow sees judges as superior interpreters in part because they are better able to describe and implement the ideal principles at work in constitutional morality, in other words, because they are more likely to *take rights seriously* (Waluchow, 2007b, p. 267). Waluchow's reasons for assigning judges the central role in identifying and defining constitutional morality reflect his effort to bring together in his theory elements from the descriptive, detached perspective of his inclusive legal positivism and from the normative perspective of Dworkin's theory of law as integrity (Waluchow, 2009, p. 159). His description of the role of the judge thus partly retains the positivist tradition of thought's preference for the authorities' viewpoint in the definition of law (even if this definition tends to be reduced to a neutral description), while at the same time retaining something of Dworkin's figure of the judge-philosopher. In Waluchow's thought, there is a particular mixture between the descriptive, neutral posture of legal positivism, the normative dimension of Dworkinian interpretive theory and the traditional method of the common law, which contributes to giving great significance to the authority and wisdom of the judge.

Waluchow is aware that the ideal scope he ascribes to constitutional morality renders problematic his claim that judges' implementation of constitutional morality reflects the genuine aspirations of a democratic community. The reference to an ideal form of morality in the definition of constitutional morality makes the application of that morality uncertain and in some ways dependent on the judgment of an interpreter rather than attributable to a democrat-

ic community as a whole (Brand-Ballard, 2008; Hübner Mendes, 2007, p. 474). The idea that constitutional morality is generally discoverable through the common law method is indeed qualified in Waluchow's thinking by the fact that there are in practice many cases in which constitutional morality fails to fully guide judicial judgment and judges must exercise some form of discretion or construction. In this respect, Waluchow remains heir to Hart's view of discretion and its distinction between cores cases and cases that fall in the penumbra of uncertainty. He does not indeed abandon the idea that is not in tune with the notion of artificial reason that individuals sometimes "create" or develop the law. This idea becomes, in a sense, even more necessary in Waluchow's theory because of his insistence on the important role played by general, indeterminate moral concepts in constitutional morality: the ideal morality that is part of the constitutional morality accepted by a community often remains too general to have a clear practical meaning, and judges must specify the concrete translations that it can receive in a community. Thus, as a complement to the image of the judge as the spokesperson for a pre-existing law, we find the Hartian figure of the judge as an "interstitial legislator" responsible for specifying the law in cases that belong to the inevitable penumbra of uncertainty of rules (Waluchow, 2007b, pp. 261-262; Waluchow, 2009, pp. 152-153; Hart, 1994, pp. 127-129, 273-274).

Waluchow remains uncomfortable, however, with the idea that the application of constitutional morality involves interpretive choice because it contradicts the democratic argument he associates with judicial review. He therefore attempts, using a variety of arguments, to limit as much as possible the discretion that individual judges are given in determining constitutional morality (Waluchow, 2011, p. 1038). He does not, however, entirely dispel the doubt that Waldron cast on the democratic legitimacy of judicial review when he drew attention to disagreements about rights in the circumstances of politics. Waluchow attempts to show that tangible disagreements about rights usually arise from citizens' moral myopia, that such disagreements more often than not con-

ceal important consensuses and that those consensuses can be discovered through a rational examination led by judges. Rights are not merely the compromises that emerge from the everyday interactions of members of a society; they are also deeper moral commitments with meaning that in most cases judges are best at identifying in practice. This argument has its limitations, however, which Waluchow himself acknowledges when he admits that intractable value conflicts remain in contemporary democracies. Gerald Postema rightly points out that the intimate association that the artificial reason of the common law establishes between law and existing custom has the consequence of making law strong where there is substantial consensus, but weak where there is controversy, i.e., when it is most needed (Postema, 1986, p. 464). As several authors point out, the fact that the moral consensus that Waluchow attributes to democratic societies is lacking precisely in cases where judges are called upon to define the constitutional morality of a community undermines the democratic legitimacy that he attempts to attribute to judicial review using the common law method (Struchiner & Schecaira, 2009, pp. 142-143; Miller, 2007, p. 311; Campbell, 2009, pp. 25-27). In cases where a community is deeply divided, judges' determination of the abstract morality contained in law can hardly be attributed to the whole democratic community to which it is to apply.

V. Conclusion

The purpose of this article has been to make Wilfrid Waluchow's notion of constitutional morality more intelligible by tracing some of its sources in Anglo-American legal thought and by showing how it relates to the idea of artificial reason. We have seen that Waluchow developed this notion under the influence of Hart and Dworkin, whose theories of law he sought to bring together in his own thought. The notion of constitutional morality that Waluchow developed was influenced by Hart's notion of rule of recognition

and by Dworkin's vision of law as integrity, and this made it possible for him to insist both on the social and institutional anchoring of law and on the coherence that emerges from it, in a way that recalls the delicate union between custom and reason that we find in the artificial reason of the common law. The influences of Hart and Dworkin's theories of law on Waluchow's constitutional morality also explain where it parts with the classical conception of the common law. The notion of rule of recognition (and of secondary rules more generally) that Waluchow finds in Hart refers mainly to authorities' practices, and it defines law's foundations in established practices in a narrower and more top-down manner than they are in the classical conception of the common law. Similarly, Waluchow adopts Dworkin's idea that the established law of a community needs to be understood in light of the general moral and political theory it presupposes and that best justifies it, and it leads him to conceive of the internal rationality of the law in a more abstract manner than in the classical notion of artificial reason. These elements show how Waluchow's notion of constitutional morality tends to subordinate the common law method to a general moral and political philosophy. It also explains the way in which constitutional morality's emphasis on the authority of law and on the constructive role of judges might compromise the social and customary anchoring of the law found in the common law tradition, and why describing it as democratic is not entirely convincing.

Waluchow's attempt to develop an understanding of law and judicial review that is grounded primarily in a community's shared practices is nonetheless remarkable. Constitutional morality and its reference to received practices in a community shows that it is possible to link the moral aspirations of citizens with the State's power and to think of the relationship between the freedom of citizens and the power of their government without falling into a clear-cut opposition between rights and law, which can often be seen in the work of thinkers after Hobbes. Drawing attention to the fact that law is anchored in established practices and recalling that it depends on relationships of mutual trust that develop over the course

of concrete social interactions can help bring serenity and introduce some practical wisdom into a debate in which calls for re-establishing the will of the majority simply provoke a legitimate desire for even greater protection for individual rights and in which, inversely, the expansion of individual rights stimulates the individual's legitimate desire to express his freedom politically. Waluchow's common law theory of judicial review and his notion of constitutional morality introduce a welcome moderate voice into Anglo-American debates.

VI. References

Aquinas, T. (1984). *Somme théologique (tome 2)*. Éditions du Cerf.

Baranger, D. (2008). *Écrire la constitution non-écrite: Une introduction au droit politique britannique*. Presses Universitaires de France.

Berman, H. J. (1994). The Origins of Historical Jurisprudence: Coke, Selden and Hale. *The Yale Law Journal*, *103*, 1651-1738.

Bouchard, K. (2021). *Constitutionnalisme et common law dans la pensée juridique anglo-américaine*. Classiques Garnier.

Brand-Ballard, J. (2008). *Review of A Common Law Theory of Judicial Review: The Living Tree*. Notre Dame Philosophical Reviews. https://ndpr.nd.edu/reviews/a-common-law-theory-of-judicial-review-the-living-tree/

Burgess, G. (1992). *The Politics of the Ancient Constitution*. Pennsylvania State University Press.

Campbell, T. (2009). Slaying the Hydra: Living Tree Constitutionalism and the Case for Judicial Review of Legislation. *Problema. Anuario de Filosofia y Theoria Del Derecho*, *1*(3), 17-36.

Coke, E. (2003). *The Selected Writings and Speeches of Sir Edward Coke* (S. Sheppard, Ed.). Liberty Fund.

Dworkin, R. (1977). *Taking Rights Seriously*. Harvard University Press.

Dworkin, R. (1986). *Law's Empire*. Harvard University Press.

Dworkin, R. (2006). *Justice in Robes*. Harvard University Press.

Dworkin, R. (2011). *Justice for Hedgehogs*. Harvard University Press.
Fortescue, J. (1980). *De Natura Legis Naturae* (C. Fortescue, Trans.). Garland.
Hale, M. (1924). Reflections by the Lrd Cheife Justice Hale on Mr. Hobbes his Dialogue on the Law. In W. Holdsworth (Ed.), *A History of English Law* (Vol. 5). Methuen and Co.
Hale, M. (1971). *The History of the Common Law of England* (C. Gray, Ed.). Chicago University Press.
Hale, M. (2017). *On the Law of Nature, Reason, and Common Law. Selected Jurisprudential Writings* (G. Postema, Ed.). Oxford University Press.
Hart, H. L. A. (1982). *Essays on Bentham*. Oxford University Press.
Hart, H. L. A. (1983). *Essays in Jurisprudence and Philosophy*. Oxford University Press.
Hart, H. L. A. (1994). *The Concept of Law. Second Edition*. Oxford University Press.
Hedley, T. (1966). Hedley's Speech, June 28, 1610. In E. R. Foster (Ed.), *Proceedings in Parliament 1610* (Vol. 2, pp. 170-181). Yale University Press.
Hobbes, T. (1971). *A Dialogue between a Philosopher and a Student of the Common Laws of England*. University of Chicago Press.
Hobbes, T. (1996). *Leviathan* (R. Tuck). Cambridge University Press.
Hübner Mendes, C. (2007). A Common Law Theory of Judicial Review: The Living Tree by W. J. Waluchow. *Cambridge Law Journal*, *66*(2), 471–474.
Lacey, N. (2004). *A Life of H.L.A. Hart. The Nightmare and the Noble Dream*. Oxford University Press.
Miller, B. W. (2007). Review Essay: A Common Law Theory of Judicial Review. *The American Journal of Jurisprudence*, *52*(1), 297–312.
Perry, S. (1997). Two Models of Legal Principles. *Iowa Law Review*, *82*, 787–819.
Postema, G. (1986). *Bentham and the Common Law Tradition*. Oxford University Press.

Postema, G. (1987). Protestant Interpretation and Social Practices. *Law and Philosophy*, *6*, 283-319.
Postema, G. (2002a). Classical Common Law Jurisprudence (Part I). *Oxford University Commonwealth Law Journal*, *2*(2), 155-180.
Postema, G. (2002b). Philosophy of the Common Law. In J. L. Coleman, K. E. Himma, & S. J. Shapiro (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (pp. 588-622). Oxford University Press.
Postema, G. (2003). Classical Common Law Jurisprudence (Part II). *Oxford University Commonwealth Law Journal*, *3*(1), 1-28.
Postema, G. (2017). Editor's Introduction. In G. Postema (Ed.), *On the Law of Nature, Reason, and Common Law. Selected Jurisprudential Writings* (pp. xv-lviii). Oxford University Press.
Raz, J. (1985). Authority, Law and Morality. *The Monist*, *68*(3), 295–324.
Salmond, J. (1893). *The First Principles of Jurisprudence*. Stevens & Haynes.
Salmond, J. (1913). *Jurisprudence. Fourth Edition*. Stevens & Haynes.
Simpson, A. W. B. (1987). *Legal Theory and Legal History. Essays on the Common Law*. Hambledon Press.
St. German, C. (1974). *The Doctor and Student* (T. F. T. Plucknett & J. L. Barton, Eds.). Selden Society.
Stoljar, N. (2009). Waluchow on Moral Opinions and Moral Commitments. *Problema. Anuario de Filosofía y Teoria Del Derecho*, *1*(3), 101-132.
Strauss, D. (2010). *The Living Constitution*. Oxford University Press.
Struchiner, N., & Schecaira, F. P. (2009). Trying to Fix Roots in Quicksand: Some Difficulties with Waluchow's Conception of the True Community Morality. *Problema. Anuario de Filosofia y Theoria Del Derecho*, *1*(3), 133-145.
Sypnowich, C. (2007). Ruling or Overruled? The People, Rights and Democracy. *Oxford Journal of Legal Studies*, *27*(4), 757-774.
Waldron, J. (1999). *Law and Disagreement*. Oxford University Press.

Walters, M. (2008). Written Constitutions and Unwritten Constitutionalism. In G. Huscroft (Ed.), *Expounding the Constitution: Essays in Constitutional Theory* (pp. 245–276). Cambridge University Press.

Waluchow. (2008). Constitutional Morality and Bills of Rights. In G. Huscroft (Ed.), *Expounding the Constitution: Essays in Constitutional Theory* (pp. 65–92). Cambridge University Press.

Waluchow, W. (1980). *Adjudication and Discretion [Unpublished doctoral thesis]*. Oxford University.

Waluchow, W. (1989). The Weak Social Thesis. *Oxford Journal of Legal Studies*, *9*(1), 23-55.

Waluchow, W. (1991). Charter Challenges: A Test Case for Theories of Law. *Osgoode Hall Law Journal*, *29*, 183-214.

Waluchow, W. (1994). *Inclusive Legal Positivism*. Oxford University Press.

Waluchow, W. (2000). Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism. *Legal Theory*, *6*(1), 45-81.

Waluchow, W. (2003). *The Dimensions of Ethics*. Broadview Press.

Waluchow, W. (2005). Constitutions as Living Trees: An Idiot defends. *Canadian Journal of Law & Jurisprudence*, *18*(2), 207-247.

Waluchow, W. (2007a). A Common Law Theory of Judicial Review. *Problema Anuario de Filosofía y Teoría Del Derecho*, *1*(1), 117-139.

Waluchow, W. (2007b). *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge University Press.

Waluchow, W. (2007c). Judicial Review. *Philosophy Compass*, *2*(2), 258-266.

Waluchow, W. (2009). A Living Tree Constitutionalist Replies. *Problema. Anuario de Filosofía y Teoría del Derecho*, *1*(3), 147-168. https://doi.org/10.22201/iij.24487937e.2009.3.8075

Waluchow, W. (2011). Democracy and the Living Tree Constitution. *Drake Law Review*, *59*(4), 1001-1046.

Waluchow, W. (2012). Constitutionalism in the European Union: Pipe Dream or Possibility? In J. Dickson & P. Eleftheriadis (Eds.),

Philosophical Foundations of European Union Law (pp. 189–215). Oxford University Press.

Waluchow, W. (2013a). Constitutional Rights and Democracy: A Reply to Professor Bellamy. *German Law Journal*, *14*(8), 1039–1051. Cambridge Core.

Waluchow, W. (2013b). On the Neutrality of Charter Reasoning. In J. Ferrer Beltrán, J. J. Moreso, & D. M. Papayannis (Eds.), *Neutrality and Theory of Law* (pp. 203-224). Springer Netherlands.

Waluchow, W. (2015). Constitutional Rights and the Possibility of Detached Constructive Interpretation. *Problema. Anuario de Filosofía y Teoría del Derecho*, *1*(9), 23-52. https://doi.org/10.22201/iij.24487937e.2015.9.8178

Waluchow, W. J. (2011). H. L. A. Hart: Supervisor, Mentor, Friend, Inspiration. *Problema. Anuario de Filosofía y Teoría del Derecho*, *1*(5), 3-10. https://doi.org/10.22201/iij.24487937e.2011.5.8106

Waluchow, W., & Stevens, K. (2016). Common Law Constitutionalism and the Written Constitution. In T. Bustamante & B. Gonçalves Fernandes (Eds.), *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (pp. 275-291). Springer International Publishing.

Cómo citar

IIJ-UNAM

Bouchard, Kevin, "Waluchow's constitutional morality and the artificial reason of the Common Law", *Problema. Anuario de Filosofía y Teoría del Derecho*, México, vol. 19, núm. 19, 2025, e18773. https://doi.org/10.22201/iij.24487937e.2025.19.18773

APA

Bouchard, K. (2025). Waluchow's constitutional morality and the artificial reason of the Common Law. *Problema. Anuario de Filosofía y Teoría del Derecho*, *19*(19), e18773. https://doi.org/10.22201/iij.24487937e.2025.19.18773