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THE LIVING TREE: FIXITY AND FLEXIBILITY A GENERAL THEORY OF (JUDICIAL REVIEW IN A) CONSTITUTIONAL DEMOCRACY?*

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Resumen:

En este artículo el autor intenta evaluar el libro más reciente de Wilfrid J. Waluchow, al caracterizar su objetivo principal, a saber: proporcionar una mejor explicación del control judicial de la constitucionalidad en una democracia constitucional mediante la metáfora del "árbol viviente"; al cuestionar un argumento, precisamente el que reduce dicha metáfora a la metodología (de abajo hacia arriba) del *common law*; y, al re-desarrollar una alternativa, específicamente al identificar la moralidad política constitucional de la comunidad, a partir de una enmienda amigable, misma que ya está explícita —o hasta cierto punto implícita— en ella, *i. e.* no sólo por los juzgadores sino también por los legisladores, incluidos los constituyentes originarios y revisores o reformadores, y otros operadores jurídicos, incluidos abogados y ciudadanos, lo cual al final de cuentas le dará el punto.

* Comment to Waluchow, Wilfrid J., *A Common Law Theory of Judicial Review. The Living Tree*, Cambridge, Cambridge University Press, 2007, presented in a Roundtable at Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México (UNAM), México City, June 27th, 2007. (Hereinafter the references to the book are included directly in the text and in between parentheses.) For a sketch of the arguments, *vid*. "Constitutions as Living Trees: An Idiot Defends", *Canadian Journal of Law and Jurisprudence*, No. 43, 2005, p. 207; and, for a summary of the book, *vid*. "A Common Law Theory of Judicial Review", *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 1, México, UNAM, Instituto de Investigaciones Jurídicas, 2007, pp. 117-139. *Vid*. also Mendes, Conrado Hübner, "Book Notice", *The Cambridge Law Journal*, No. 66, 2007, p. 471.

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Abstract:

In this article the author aims to assess Wilfrid J. Waluchow's more recent book, by depicting its main aim, namely to provide a better understanding of judicial review in a constitutional democracy via the "living tree" metaphor; by disapproving an unwarranted claim, purposely to reduce the metaphor to the common law (bottom-up) methodology; and by re-developing his alternative, specifically to identify the community's constitutional political morality, with a friendly amendment, which is already explicit —or at least somehow implicit— on it, i.e. not only by judges but also by legislators, including framers, amenders or reformers, and other legal officials, including lawyers and citizens, which at the end will grant him the point.

> [A]ll systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social interests, and the need to leave open, for latter settlement by an informed official choice, issues which can only be properly appreciated and settled when they arise in a concrete case...
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> H. L. A. HART, *The Concept of Law*, 1961.

SUMMARY: I. *Introduction*. II. *The Living Tree Metaphor*. III. *Towards a Better Understanding of Judicial Review: The Debate*. IV. *Waluchow's Alternative: A Common Law Theory of Judicial Review*. V. *An Amendment to Waluchow's Alternative: A General Theory of (Judicial Review in a) Constitutional Democracy?* VI. *Other Institutional Forces and Requirements: Judges, Legislators, other Legal Officials, Lawyers and Citizens*. VII. *Conclusion.*

I. INTRODUCTION

Taking the Constitution and the Charter Rights seriously is one of the aims of Wilfrid J. Waluchow's *A Common Law Theory of Judicial Review. The Living Tree* and taking the claims of this book seriously is one of the ambitions of mine for this roundtable and hereinafter, as Jules Verne might put it "around the world for eight days".[1] Clearly, in this

[1] The allusion to Jules Verne's novel *Around the World in Eight Days* was aimed, originally, to suggest that this commentary was going to be one of a series of formal and informal exchanges carried all over the world not only in México City

case, Waluchow is a Canadian version of the Englishman Phileas Fogg, *i.e.* Phileas Hockey, and myself a Mexican vision of his French assistant Passepartout, *i. e.* Passesfor-everything or Pasaportodo —and in the Spanish translation Juan Picaporte.

Analogously, I will intend: in the coming first two sections, to praise different aspects of his journey/voyage, although I may from time to time get him into trouble; in the third, to appraise what I consider to be an unnecessary deviation that might derailed him from his conquest/prize; and, in the last two, to raise his original route with what I consider to be a better trail to get him back railed on the right track. In other words, I pretend: (1) to depict his main aim, *i.e.* to provide a better understanding of judicial review in a constitutional democracy via the "living tree" metaphor; (2) to disapprove of an unwarranted claim, *i.e.* to reduce the "living tree metaphor" to the common law (bottom-up) methodology; and (3) to re-develop his alternative, *i. e.* to identify the community's constitutional political morality, with a friendly amendment, which is already explicit —or at least somehow implicit— on it, *i. e.* not only by judges but also by legislators, including framers, amenders or reformers, and other legal officials, including lawyers and citizens, which at the end will grant him a victory/win.

II. The Living Tree Metaphor

I applaud the "living tree" metaphor as drawing the picture of a "living constitution" beyond the given portrait of a

(México) but also in Cambridge (United Kingdom) during the "H. L. A. Hart Conference" and in Krakow (Poland) during the XXIII IVR World Congress *Law and Legal Cultures in the 21st Century: Diversity and Unity*, in general, and in a Special Workshop "Charters, Constitutions and Democracy" organized to assess and discuss Waluchow's book, in particular. However, the connotation draws a further akin relationship between the assistance provided by one of the characters (affable and empathetic) to another and the assessment offered by a commentator (amiable and sympathetic) to an author.

"dynamic constitution".[2] A distinction is helpful: although, living beings or things and non-living beings or things can be dynamic, the latter are much more limited than the former. For instance, a functioning machine can be set in motion and stopped, *i.e.* turn on and turn off, by someone or something, in more or less expected and foreseen ways, whereas an organism has a life of its own and hence is capable of (re)acting in different and at some point unexpected and unforeseen ways.[3] To sum up the idea and its

[2] Although there are different approaches to constitutional interpretation and not all accept the idea of the "living constitution" —such as literalism and originalism— its dynamic feature has increasingly gained acceptance. However, the allegory of a "dynamic constitution" is very limited. Hence, I prefer —despite the ongoing criticism mainly from the originalists— the "living constitution" as portrayed in the "living tree" analogy. *Vid*. Beard, Charles A., "The Living Constitution", *Annals of the American Association of Political and Social Sciences*, No. 185 (The Constitution in the 20th Century), May, 1936, pp. 29-34; Fallon, Richard H. Jr., *The Dynamic Constitution. An Introduction to American Constitutional Law*, Cambridge, Cambridge University Press, 2004; and Waluchow, Wilfrid J., *Inclusive Legal Positivism*, Oxford, Oxford University Press, 1994, p. 67: "those who claim that judges should view the constitution as a 'living tree' and interpret it in ways which express an ever-changing view and developing political morality". *Cfr*. Bork, Robert H., "Neutral Principles and Some First Amendment Problems", *Indiana Law Journal*, No. 47, 1971, p. 1; and, *The Tempting of America. The Political Seduction of the Law*, New York, The Free Press, 1990; Rehnquist, William H., "The Notion of a Living Constitution", *Texas Law Review*, No. 54, 1976, p. 693; and Scalia, Antonin, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws" and "Response", in *A Matter of Interpretation. Federal Courts and the Law*, Princeton, Princeton University Press, 1997, pp. 3-47 and 129-149, and, "A Living Constitution Doesn't Exist", in *http://newsarchives.tamu.edu/stories/05/050505-10.html*, on one side; and, Ackerman, Bruce, "The Living Constitution", *Harvard Law Review*, vol. 120, No. 7, May, 2007, pp. 1737-1812; Balkin, Jack M., "Alive and Kicking. Why No One Truly Believes in a Dead Constitution", in *http://www.slate.com/id/2125226/;* "Synthesizing Originalism and Living Constitutionalism", in *http://balkin.blogspot.com/2005/08/synthesizing-originalism-and-living.html*, "Confusion about Originalism?", in *http://balkin.blogspot.com/2006/08/confusion-about-originalism. html*; and, Leiter, Brian, "Originalism Redux", in *http://leiterreports.typepad.com/blog/2005/06/originalism_red.html*; and "«Originalism Redux» Redux (with a reply to Solum)" in *http://leiterlawschool.typepad.com/leiter/2006/08/originalism_red. html*, on the other.

[3] Elsewhere I have pointed out the intrinsic limitations of thinking of law —and for that purpose the constitution and its reconstitution via constitutional reenactments and amendments or reforms— in merely mechanic-physical terms. *Vid*. Flores, Imer B., "Reconstituting Constitutions —Institutions and Culture. The Mexican Constitution and NAFTA: Human Rights *vis à vis* Commerce", *Florida Journal of International Law*, vol. 17, no. 3, December, 2005, pp. 695-698. Some-

implications to the balance between the need for fixity and flexibility, let me start by quoting Waluchow himself (p. 55):

> If... one views a constitution as a "living tree" that grows and adapt to contemporary circumstances, trends, and beliefs and whose current and continued authority rests on its justice or on factors like the consent, commitment, or sovereignty of the people-*now*, not the framers or the people-*then*, then one will be far less likely to find such appeals (*i.e.* the appeal to fixity, not flexibility) conclusive, or even particularly relevant.

In short, it is "a tree that is very much alive" (p. 69) —and I might add— "and kicking" to follow Balkin's idea. A "living thing" capable of "organic growth" (p. 183, fn 6): a tree which has roots already fixed and stable (or entrenched and written), as well as flexible and adaptable branches to be continuously fixed and re-fixed (or to be entrenched and written, and —if you want— to be re-entrenched and re-written).

Let me advance that the "living tree" metaphor, as such, was introduced in *Edwards v. Attorney General of Canada* (also known as the "Persons Case"), which was decided in 1930 by the Privy Council of the United Kingdom and recognized for Canadians in Canadian Law most of the rights included now in the Charter long before its introduction in 1982 (By the way, let me congratulate the Canadians for the first 25 years of their living Constitution; and, let me advance that at some other point in time, I pretend to develop from this fact an argument against Waluchow's inclusive legal positivism account.)

how an organic-biological alternative is much more promising. *Cfr.* Hayek, Friedrich A. von, *The Constitution of Liberty*, Chicago, The University of Chicago Press, 1960, p. 70: "Our attitude ought to be similar to that of the physician toward a living organism: like him, we have to deal with a self-maintaining whole which is kept going by forces which we cannot replace and which we must therefore use in all we try to achieve. What can be done to improve it must be done by working with these forces rather than against them. In all our endeavor at improvement we must always work inside this given whole, aim at piecemeal, rather than total, construction, and use at each stage the historical material at hand and improve details step by step rather than attempt to redesign the whole".

However, the notion of the "living constitution" as a "living tree" can be traced back to Chief Justice John Marshall, who, in *McCulloch* v. *Maryland* (1819), recall the nature of the Constitution and its interpretation: "[W]e must never forget that it is a constitution we are expounding... [a constitution does not] partake of the prolixity of a legal code... a constitution, intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs". And, one century after, Justice Oliver Wendell Holmes Jr., in his dissent in *Abrams v. United States* (1919), recollected: "[O]ur Constitution... is an experiment, as all life is an experiment".[4] And, one year later, in *Missouri v. Holland* (1920), remembered:

> When we are dealing with words that are also a constitutent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely of what was said a hundred years ago.

Likewise, in those same years, Justice Louis D. Brandeis remembered: "Our Constitution is not a straight jacket. It is a living organism. As such, it is capable of growth or expansion and adaptation to new conditions. Growth implies changes, political, economic and social".[5] And, similarly, Justice Benjamin N. Cardozo, in *The Growth of the Law*

[4] *Cfr.* Holmes, Oliver Wendell Jr., "Book Notices", *American Law Review*, No. 14, January, 1880, p. 234; and *The Common Law*, New York, Dover, 1991, (originally published in 1881), p. 1: "The life of the law has not been logic: it has been experience".

[5] Louis D. Brandeis quoted (from Brandeis Papers, Harvard Law School) by Brennan, William J., "Why Have a Bill of Rights?", *Oxford Journal of Legal Studies*, No. 9, 1989, p. 426.

—the sequel to his famous *The Nature of the Judicial Process*— reminded:[6]

> The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.

III. Towards a Better Understanding of Judicial Review: The Debate

I admire the way the debate was framed and re-framed by Waluchow not only by introducing helpful distinctions but also by presenting the debate itself.

On the one hand, I am certain that the book contains analytical and critical distinctions, which are quite helpful to understand the importance of the debate: Rex/Regina, sovereign/government, limited/unlimited, constitutional law/constitutional convention, procedural conception of democracy/constitutional conception of democracy, Regas/Demos, Hercules/Ulysses —re-labeled here as Atticus (on behalf of Atticus Finch, the character of the fictional novel *To Kill the Mockingbird*, a lawyer, brutally honest, highly moral, and a tireless crusader for good causes —even hopeless ones),[7] expressed wishes/best interests, authentic-genuine wishes/unauthentic-not genuine ones, "top-down"/"bottom-up" methodologies, people-then/people-now, and so on.

On the other hand, I am confident that the book includes an extensive and exhaustive analysis and criticism of all

[6] Cardozo, Benjamin N., *The Growth of the Law*, New Haven, Yale University Press, 1924, p. 1. *Cfr. The Nature of the Judicial Process*, New Haven, Yale University Press, 1921.

[7] Although I am sympathetic with the idea of legal officials, including lawyers and citizens, resembling Atticus Finch, highly ethical and moral approach to law, I fear that legislators are not or at least do not tend to be as him. Clearly, judges neither are nor tend to be like him.

the arguments, claims, examples, and objections, embedded in the standard case for Judicial Review as well of all counter-arguments, claims, examples, and objections, implanted in the critics' case against it, including their "Argument from Democracy". In fact, it is hard to imagine, even one single argument, claim, example, or objection and their corresponding counter-argument, claim, example, or objection, made by both the advocates and the critics of written entrenched Charters and Judicial Review, such as Ronald Dworkin and Jeremy Waldron, respectively, or any other authors known, left out.

Let me point out that after a brilliant exposition of both the standard case and the critics case, Waluchow starts a no less brilliant exploration of the possible routes for an ongoing debate. Instead of talking past each other as no threat or thwart has been imposed unto the road, he decided courageously, rather than taking a long detour or a short-cut taking him nowhere, to face the dangers and obstructions blocking the road ahead.

Faced with the option of abandoning entrenched written Charters and Judicial Review altogether as Waldron advised —or at least partially as Tom Campbell advocated, by adopting a legislative Bill of Rights to be enforced not by courts but by legislatures—[8] Waluchow developed an alternative to it, which constitutes a better understanding of the role of Charters Rights and Judicial Review in a Constitutional Democracy.

IV. Waluchow's Alternative: A Common Law Theory of Judicial Review

I agree with almost everything Waluchow says, in the six chapters of the book, including the conclusions but I have a small problem with one of the premises (someone might

[8] *Cfr.* Campbell, Tom, "Legislating Human Rights", in Wintgens, Luc J. (ed.), *The Theory and Practice of Legislation: Essays on Legisprudence*, Aldershot, Ashgate, 2005, pp. 219-238.

even think that it is a conclusion in itself). My feeling is that this premise (or conclusion) is unnecessary for the main objective. I refer mainly to the fifth chapter or at least to something within its core. It is not truly a small, but a big problem.

My hunch is that throughout the book Waluchow has been formulating powerful arguments not only for a better understanding of Charters Rights and Judicial Review in a Representative Democracy (or for those having a Procedural Conception of Democracy) but also for limited government in a Constitutional Democracy (or for those holding a Constitutional Conception of Democracy), where both legislation and adjudication, legislatures and courts, legislators and judges, are compatible with their respective limits and powers not merely functioning but coexisting in a division of labor as complementary and not merely by controlling each other.

In addition, even more precisely, the problem is with circumscribing the alternative to the Common Law methodology, which is characterize as a bottom-up one to meet the challenge that disagreement comes all the way down: suggesting that it is possible to revise Charter Rights by Judicial Review at the point of their application. The approach echoes H. L. A. Hart's to-the-center moves, which resembles Aristotle's middle term. Let me rephrase it: Common Law reasoning is revisable at the point of application, whereas Statutory Law is not. Charter Rights, which resemble fixed Statutory Law in the sense that they are entrenched and written, require a flexible application similar to the one of Common Law. Hence, the Common Law methodology appears to be the way out. Actually, as I said, it seems the way up to face disagreement all the way down.

My gut feeling is that this is not the case. It might be the case for an un-entrenched unwritten Charter constructed all the way up by judges alone as judge made-law, but not to an entrenched written one, in which legislators, including framers, amenders or reformers have a say: they have

already said something and are entitled to say something else. Keep in mind that Bill of Rights are, in most countries, nowadays, both entrenched and written, and enforced, apparently, with a Common Law methodology in Common Law countries, and, arguably, with a somewhat different methodology (1) in non-Common Law countries, such as Civil/Roman Law ones, for instance, Colombia, Germany, Italy, Spain and, for that purpose, México; (2) in the rest of the world and even by regional courts on human rights, such as the European, the Inter-American and the African; and, (3) in portions of Common Law countries, with strong Civil/Roman Law backgrounds, for instance, Louisiana in the United States of America and Quebec in Canada.

However, it is clear that the differences between the Common Law and the Civil Law systems and their respective methodologies tend to be exaggerated, overdrawn and overstated, whilst both systems are getting closer and resemble each other more every day. Actually, it might be argued that the former is more flexible than fixed, while the later is more fixed than flexible. But both, in dealing with precedents, have found a balance between these two competing needs for fixity and flexibility. Hence, it is possible to be thinking of a shared methodology and a much more similar way of reasoning all across the board. It is, certainly, "something like" the Common Law, but not the Common Law *per se*.

For the purpose of identifying the puzzling Common Law features, Waluchow quotes a summary made by Frederick Schauer in his book review of *The Nature of the Common Law* of Melvin Aron Eisenberg.[9] In short, the rules of the Common Law: (1a) are nowhere canonically formulated or there is no single authoritative formulation; (2a) are not made by legislatures, but by courts; (3a) are created by courts in the very process of application (and applied retroactively to facts arising prior to the establishment of the

[9] *Vid*. Eisenberg, Melvin Aron, *The Nature of the Common Law*, Cambridge, Massachusetts, Harvard University Press, 1988.

rule); and (4a) are not only created interstitially but also modified or replaced when its application would generate a malignant result in the case at hand.[10]

To the contrary, Charter Rights: (1b) are everywhere formulated, although with open texture and vague terms that certainly do not provide a single (straightforward) authoritative formulation; (2b) are neither made by legislatures nor by courts, but drafted originally into a authoritative source such as the Constitution or in a Bill or Charter of Rights, as well as incorporated to it by means of Constitutional Conventions and Constitutional Amendments or Reforms, by its framers, amenders or reformers, and certainly redefined or remade by both legislatures and courts, via legislation and its application-interpretation; (3b) are not created out of the blue by courts in the process of application (and hence not necessarily applied retroactively), but certainly revisable by them at point of application; and (4b) are neither created interstitially nor modified or replaced, when its application would generate a malignant result in the case at hand —or at least no need to be, for example, remember the racial segregation cases in the United States of America.

Furthermore, the Common Law methodology as such was not directed to deleting or subtracting rules from the system but to inserting and adding other rules to it. Justice Antonin Scalia stated: "It should be apparent that by reason of the doctrine of *stare decisis*... the common law grew in a peculiar fashion —rather like a Scrabble board. No rule of decision previously announced could be erased, but qualifications could be added to it".[11]

So far there is no conclusive argument for sustaining that the Common Law methodology is the defining one underlying Charter cases. Somehow it is true that by lacking a single (straightforward) formulation, due to the fact of being enacted —and reenacted— with open texture and vague

[10] Schauer, Frederick, "Is the Common Law Law?", *California Law Review*, No. 77, p. 455.

[11] *Cfr.* Scalia, Antonin, "Common-Law Courts...", *cit.*, note 2, p. 8.

terms, Charter Rights require to be constantly revised at the point of application in case-by-case scenarios and from time-to-time. Certainly, I am not ruling out that "something like" the Common Law —or at least the Common Law in part or partially— plays a defining part and a key role here and elsewhere. Keep in mind Eisenberg introductory remarks:[12]

> My purpose here is to develop the institutional principles that govern the way in which the common law is established in our society [*i. e.* a Common Law country, such as the United States of America]. Much of our law derives from rules laid down in constitutions, statutes, or other authoritative texts that the courts must interpret but may not reformulate. The common law, in contrast, is the part of the law that is within the province of the courts themselves to establish. In some areas of law, like torts and contracts, common law rules predominate. In other areas, like corporations, they are extremely important. In all areas, even those that are basically constitutional or statutory, they figure at least interstitially.

Additionally, I can hardly imagine Waldron and Dworkin —or someone else for that effect— not coming after Waluchow for his move.

On the one hand, Waldron —or any other critic— might hold him accountable for not taking the legislators and legislatures seriously by not accommodating them into the theory. Why insist on judges and courts as the one and only (final) sole law-makers or interpreters of Charter Rights? What about legislators, including framers, amenders or reformers? It does not suffice to affirm. "The result [of mixing Hart, Reaume, and Schauer] is our alternative model of Charters and their legitimacy, the common law conception, which in no way undermined by the circumstances of politics" (p. 209).

[12] Eisenberg, Melvin Aron, *The Nature of the Common Law*, *cit.* note 9, p. 1. *Cfr.* Calabresi, Guido, *A Common Law Review for the Age of Statutes*, Cambridge, Massachusetts, Harvard University Press, 1981.

On the other hand, Dworkin —or any other advocate— might hold him accountable for obscuring what judges and courts do by suggesting that it is all the way up flexible interpretation: Is it really a bottom-up methodology, all the way up flexible interpretation, regardless of the fixity, *i.e.* entrenched and written character, of Charters? I guess not. What's more doing it, *i.e.* admitting that it is the Common Law bottom-up methodology, will be like saying that the living tree grows from the branches towards the roots and that will amount to throwing the metaphor away with the bath water.

To sum up, my claim is that "The Living Tree" is not merely "A Common Law Theory of Judicial Review", since it is much more than that: "A General Theory of (Judicial Review in a) Constitutional Democracy". On one side, it is a general theory and methodology beyond the boundaries of the Common Law system and its bottom-up methodology; and, on the other, it is not limited to the role that judges play in Judicial Review, but to their role in a Constitutional Democracy and its compatibility with the one played by legislators, including framers, amenders and reformers, as well as other legal officials and operators, such as lawyers and citizens.

Waluchow can easily answer to my objection by saying that (1) he is interested in developing a Common Law Theory of Judicial Review for Common Law countries with a Common Law methodology or system; and (2) he is interested neither in a General Theory of Judicial Review nor to be applied to a Constitutional Democracy. However, I am certain that it is the contrary, since he is truly interested in providing a better understanding of Charter Rights and Judicial Review, *i.e.* a general description-explanation, to be applied all across the board. But why labeled it as a Common Law, bottom-up methodology, when it is neither truly so nor need to be the case? It might be "something like" the Common Law, but not *per se*. In other word, something shared in common by all legal systems with written en-

trenched Bill or Charters of Rights and Judicial Review. Hence, the quest for an alternative, *i.e.* an amendment or reform to his alternative, is indispensable.

V. An Amendment to Waluchow's Alternative: A General Theory of (Judicial Review in a) Constitutional Democracy?

My amendment, following Waluchow's Hartian move, can also be labeled as occupying the center-middle. My claim is that, in Charter cases, we start with the interpretation of the text, a fixed entrenched and written Charter of Rights, with open-texture and vague terms, something like a Statutory Law, top-down methodology; and, then, only then, we confront it —at the point of application— with "something like" a Common Law, bottom-up methodology, as Waluchow rightly claims.

Clearly, it is not all the way-down Statutory Law application by a judge completely deferential to whatever the legislator, including the framer, the amender or the reformer, said; nor all the way-up Common Law revision at the point of application as judge-made law. It is a different methodology one that requires a meeting point, as the one provided by Waluchow himself in chapter sixth, *i. e.* finding the community's constitutional morality, by using "something like" John Rawls' "reflective equilibrium" —or even "something like" H. L. A. Hart's "critical reflective attitude".[13]

[13] *Vid*. Rawls, John, *A Theory of Justice*, Cambridge, Massachusetts, Harvard University Press, 1971, pp. 20-21, 48-51, and so (In the revised ed., 1999, pp. 18-19, 42-45 and so). Hart, H. L. A., *The Concept of Law*, Oxford, Oxford University Press, 1961, p. 56 (In the 2nd. ed. "With a Postscript edited by Penelope A. Bulloch and Joseph Raz", 1994, p. 57.) For a continental alternative to Rawls, *vid*. Habermas, Jürgen, "Reconciliation Through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*", *Journal of Philosophy*, No. 92, 1995, pp. 109-131; and *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Massachusetts: MIT Press, 1996. Elsewhere I have criticized Hart's "critical reflective attitude" as developed uncritically by one of his disciples but endorsed the necessity of adopting the internal point of view and the neediness for a critical reflective attitude —or at least "something like" it. *Vid*. Flores, Imer B., "In the Dark Side of the Conventionality Thesis?", in Villanueva,

One part of which is already fixed, as a sort of pre-commitment, but drafted in open-texture and vague terms, by the way flexible which required to be re-fixed, adapted in case-by-case scenarios and from time to time, by courts and judges, but leaving space for legislatures and legislators, including framers, amenders or reformers, as well as other legal officials, to play a key role in other stages of the political process or as Waldron puts it in the circumstances of politics. But this complex methodology is compatible with the one portrayed, by some advocates of the standard case for Judicial Review, such as Dworkin's "integrity model", including both fit and moral value or worth, or John Hart Ely's "representation reinforcement model", incorporating the representation of minorities at the same time of balancing both the impossibility of a (strict) clause-bound interpretivism and the necessity of discovering fundamental values.[14]

In my opinion, the methodology requires to keep a complex balance not only between fixity and flexibility but also

Enrique (ed.), *Studies in Social, Political and Legal Philosophy. Philosophy of Law and of Politics*, Amsterdam, Rodopi, 2002, pp. 155-156.

[14] *Vid*. Dworkin, Ronald, *Taking Rights Seriously*, Cambridge, Massachusetts, Harvard University Press, 1977 (2nd. ed., "With a Reply to Critics", 1978), and *Law's Empire*, Cambridge, Massachusetts, Harvard University Press, 1986; and Ely, John Hart, *Democracy and Distrust. A Theory of Judicial Review*, Cambridge, Massachusetts, Harvard University Press, 1980. *Cfr*. The famous footnote n. 4 of *United States v. Carolene Products Co.* (1938), which paved the way to the Warren Court and indeed inspire Ely's "representation reinforcement model":

"There may be narrower scope for operation of the presumption of constitutionality when *legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth...

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation...

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities ...: whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

between fallibility and finality. In that sense, it is an open procedure that allows other actors, besides judges, to play their respective roles. It implies a constant revision not only at the point of application but also at any other point in time; and requires the greater space available for deliberation and experimentation about the capacities, necessities and possibilities for organic growth within its limits. In my opinion it is a methodology, which allows falsifying some (mis)interpretations and (mis)applications, or simply modifying or replacing them with better interpretations and applications if not by the correct and right ones. It is something like the trial-and-error process of the natural, biological or physical sciences, proposed by Justice Brandeis, in his dissent in *Burnet v. Coronado Oil & Gas Co.* (1932):[15]

> *Stare decisis* is not, like the rule of *res judicata*, universal inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

[15] *Vid*. Brandeis, Louis D., "Experimentation" and "Trial and Error", in Goldman, Solomon (ed.), *The Words of Justice Brandeis*, New York, Henry Schuman, 1953, pp. 76 and 172: "The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error".

The process of trail-and-error describes and explains how an error in legislation is corrected by adjudication and *vice versa*, *i.e.* how an error in adjudication is prevented by legislation. By the by, the former does not amount to "judicial legislation" nor constitutes a "judicial usurpation", as Lon L. Fuller said: "The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective".[16] In contrast, the latter does not amount to "legislative adjudication" nor constitutes a "legislative usurpation", as Fuller might say: "The prevention of obvious adjudicative errors or oversights is not to supplant the judiciary will, but to make that will effective".

What I have in mind is that other institutions, with varying forces, must come into play to assure the constant and continuous participation not only of judges but also of legislators, including framers, amenders or reformers, as well as other legal officials. Waluchow mentions, in this book, for example, section 33 of *The Constitution Act* of Canada (p. 130) and sections 4 and 7 of the *Bill of Rights Act* of New Zealand (p. 129); and, in his previous one, *i.e. Inclusive Legal Positivism*, article 12 of the French Law of 16-24 August 1790 and article 256 of the French Constitution of 1790 (requiring the Courts to address the Legislative if it is necessary to interpret the law for a binding determination.)[17]

In addition, I can point out in the case of Mexico and its Federal Constitution: *1)* article 72, section f, which empowers the legislative to issue, among other things, interpretative decrees; *2)* article 105, which requires the vote of 8 justices out of the 11 that constitute the Supreme Court at large (or 4 out of the 5 that constitute each one of the two benches) to have a general (derogatory) effect in some

[16] Fuller, Lon L., "The Case of the Speluncean Explorers", *Harvard Law Review*, Vol. 112, No. 8, 1999, p. 1859 (Published originally in 1949; and, republished in: Peter Suber (ed.), *The Case of the Speluncean Explorers. Nine New Opinions*, London, Routledge, 1998, p. 14).

[17] *Vid*. Waluchow, Wilfrid J., *Inclusive Legal Positivism*, *cit.*, note 2, pp. 241-242. *Cfr*. Marmor, Andrei, "Are Constitutions Legitimate?", *Problema. Anuario de Filosofía y Teoría del Derecho*, México, No. 1, 2007, pp. 114 and 115.

cases; and 3) article 135, which imposes a 2/3 supra-majority of the members present in both chambers of Congress, discussing and approving it consecutively (and a simple majority of the legislatures of the states) for a constitutional amendment or reform.

VI. Other Institutional Forces and Requirements: Judges, Legislators, Other Legal Officials, Lawyers and Citizens

Let me advance that any successful alternative has not only to cope with fixity and flexibility but also deal with fallibility and finality. In a Constitutional Democracy, Judicial Review is necessary to check the fallibility of the human condition, such as the one of legislators, including framers, amenders or reformers. Why assume that legislators are infallible? In addition, legislators do not have a final say and legislation does not count as finality. Why suppose that legislators are final?[18] However, since judges are not infallible and hence are not entitled to the final say, either; it is necessary to keep the process open, *i.e.* revisable in case by case scenarios and from time to time, which reinforces the need for an adequate balance between fixity and flexibility.[19] In Waluchow's own words: "Charters transform complex issues of political morality... into «them-against-us»

[18] Waluchow, Wilfrid J., *Inclusive Legal Positivism*, *cit.*, note 2, p. 252: "We might grant that within an ideal world in which legislators have sufficient time and energy to deal properly with hard cases, it would be better if they, and not judges, performed the delicate balancing of social aims, purposes, and principles such cases typically require. But of course in our less than perfect world, legislators have neither the time nor the energy to acquaint themselves adequately with all the facts and all the implications of all hard cases. Even if they were somehow able to make the necessary time, there is little doubt that the wheels of government and justice would be forced to turn far more slowly than we should find acceptable. So given these practical considerations, it seems to follow that judges and not legislators are our best hope in dealing with hard, penumbral cases".

[19] *Vid*. Brandeis, Louis D., "Experimentation" and "Man" in Solomon Goldman (ed.), *The Words of Justice Brandeis*, *cit.*, note 15, pp. 76 and 128: "Man is weak and his judgment is at best fallible".

battles", when what is required is quite the opposite, *i. e.* "open discussion, the ability to see the other side's point of view, and ultimately compromise and mutual accommodation" (p. 173).

It is true that there seems to be disagreement all the way down, but there might be some agreement all the way up. Hence, what we need is neither a *diktat* from one to the other or *vice versa*, nor a final arbiter or referee, but a better understanding of the dialectical and dialogical relationship between courts and legislatures, as well as other legal officials, in the search for *the* community's constitutional morality. For instance, the different institutional forces and requirements that come into play in México to check not only the fallibility and finality but also the fixity and flexibility include:

1) Legislation has to be passed by an absolute majority, *i.e.* 50% + 1, of the members present in both chambers of Congress, discussing and approving it sequentially (article 72), whereas a Constitutional Amendment or Reform has to be passed —as we already indicated— by a 2/3 supra-majority, *i. e.* 66.66%, of the members present in both chambers of Congress, discussing and approving it successively (and the absolute majority, *i. e.* 50% + 1, of the legislatures of the states) (article 135).[20]

2) Legislation can be vetoed by the president and the veto can be overridden by a 2/3, *i.e.* 66.66%, supra-majority of the members present in both chambers of Congress, also by discussing and approving it one after another (article

[20] Elsewhere I have pointed out that different forms of legislation, including the enacted properly by a legislative assembly and a constitutional amendment or reform, have different institutional forces and requirements. *Vid.* Flores, Imer B., "Legisprudence: The Forms and Limits of Legislation", *Problema. Anuario de Filosofía y Teoría del Derecho*, México, No. 1, 2007, pp. 266-268 (Earlier versions appeared, with the same title, in José Juan Moreso (ed.) *Proceedings of the 22nd IVR World Congress Granada 2005. Volume I: Legal Theory / Teoría del derecho. Legal Positivism and Conceptual Analysis / Positivismo jurídico y análisis conceptual*, (*Archiv für Rechts- und Socialphilosophie* (*ARSP*), Beiheft Nr. 106,) Stuttgart, Franz Steiner Verlag, 2007, pp. 197-199; and, as "Lon L. Fuller's Implicit Laws of Lawmaking: The Forms and Limits of Legislation", *De Legibus. Revista de Harvard Law School Association of Mexico*, Vol. V, No. 5, 2006, pp. 92-96).

72), whereas a Constitutional Amendment or Reform cannot be vetoed, since it has been already overruled by the 2/3 requirement *ex ante*.[21]

3) Legislation itself, a Constitutional Amendment or Reform, and their further applications by legal officials can be subjected to judicial review, but to have a general (derogatory) effect in some cases —as we already mentioned— a vote of at least 8 justices out of the 11, that constitute the Supreme Court at large, *i. e.* 72.72%, (or at least 4 out of the 5, that constitute each one of the two benches, *i. e.* 80%) is required (article 105);[22] and

4) Legislation and Constitutional Amendments or Reforms can be passed again and again until the criteria identified by the Supreme Court are met.

VII. Conclusion

If I am correct/right, with my friendly amendment, Waluchow will be back railed on track again with a General Theory of (Judicial Review in a) Constitutional Democracy, but if I am incorrect/wrong, I am merely an idiot tying myself to the mast and trying to assist someone else to tie himself to the mast. Anyway, if we follow Balkin suggestion: "We are all living (tree) constitutionalists now. But only some of us are willing to admit it".[23]

[21] Elsewhere I have pointed out that Constitutional Amendments or Reforms, as forms of Legislation, are subjected to the same limits, including Judicial Review. *Vid*. Flores, Imer B., "Sobre las formas y los límites de la legislación: A propósito de la constitucionalidad de una reforma constitucional", in Valadés, Diego and Carbonell, Miguel (eds.), *El Estado constitucional contemporáneo. Culturas y sistemas jurídicos comparados*, México, UNAM, Instituto de Investigaciones Jurídicas, 2006, t. I, pp. 271-292 (A revised version appeared as "Sobre la constitucionalidad de una reforma constitucional", *Precedente. Anuario Jurídico 2006*, Cali, Facultad de Derecho y Ciencias Sociales de la Universidad ICESI, 2007, pp. 83-104.)

[22] *Ibidem*, p. 283. (p. 94.)

[23] Balkin, Jack M., "Alive and Kicking...", *cit.*, note 2.