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REVIEW OF JEREMY WALDRON, *LAW AND DISAGREEMENT*

LAW AND DISAGREEMENT. By Jeremy Waldron.† New York: Oxford University Press, 1999. Pp. 332. \$65.00

Richard A. Posner*

In Law and Disagreement, Jeremy Waldron, born and educated in New Zealand and trained in England, mounts a powerful argument in favor of legislation as a legitimate source of authority and correspondingly denigrates the American faith in judicial review. Waldron claims among other things that a legislature's inability to achieve consensus enables legislation to resolve disputes in a way that preserves the dignity and self-respect of losers in the policy struggle.

In this Book Review Essay, Judge Posner commends Waldron for his impressive criticisms of the theoretical basis for the American faith in judicial review. At the same time, he criticizes Waldron's view of legislation as starry-eyed and insufficiently attuned to the realities of the American judicial system. Although Waldron shows that the philosophical arguments supporting judicial review are weak, he does not show that judicial review itself is, on balance, a practice we would do best without.

Jeremy Waldron, law professor and political philosopher, is a New Zealander educated there and in England, and, although he has lived and worked in this country for many years, he brings to the study of American constitutional theory the valuable perspective of an outsider. He sees things that we natives overlook even though they are right before our eyes. In *Law and Disagreement* he presents a compelling criticism of the theoretical basis for the American faith in "judicial review," that is, the power of courts to invalidate statutes (and other government actions, but he confines his discussion to the invalidation of statutes). It is a power more deeply entrenched in the United States than elsewhere, though now widely imitated abroad.

The basic warp that Waldron has identified in orthodox constitutional theory is that "[t]he only structures that interest contemporary philosophers of law are the structures of judicial reasoning. They are intoxicated with courts and blinded to almost everything else by the delights of constitutional adjudication" (p. 9). They are not interested in legislation; they distrust it. They distrust democracy, too, and in the most aggressive

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* Chief Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is a review of Jeremy Waldron, *Law and Disagreement* (1999). Page references to the book appear in the text of this review. I am grateful to the other participants in a symposium on Waldron's book held at Columbia Law School on September 23, 1999, in particular Waldron, William Eskridge, and Michael Dorf, for helpful discussion of the issues raised by the book, and to Cass Sunstein for helpful comments on a previous draft.

conceptions of judicial review—for example, that of Ronald Dworkin—they trivialize democracy by confining the right to vote to “interstitial issues of policy that ha[ve] no compelling moral dimension” (p. 15), the big issues having been consigned to the courts, that is, to committees of lawyers. This blindness, as Waldron points out, is not limited to constitutional theorists. Legal positivists such as H.L.A. Hart, who had no interest in judicial review, are intensely interested in legislatures as the source (in conventional positivist thinking, the only legitimate source) of law, but they have no interest in the structure or the institutional details of legislatures. When these oversights are corrected and legislatures given the same careful and sympathetic scrutiny that constitutional theorists give to courts, important issues of constitutional theory (in a broad sense not limited to the legitimacy or exercise of the power of judicial review) are seen in a new light.

Concerning legislatures, the point that Waldron particularly stresses—a point obvious when attention is drawn to it, yet one that American legal thinkers have neglected—is that legislators do not, at least routinely, reason their way to “correct” conclusions. They vote. The side that loses is not convinced by the vote that it was wrong; its convictions are unaltered; it merely accepts defeat, perhaps comforting itself with the thought that it may win the next time, or with having obtained some concessions by way of compromise. In other words, disagreement is the permanent state of the legislative process; it is not dispelled, it is merely overcome, by horse trading and the counting of noses. These may seem—these have seemed, to our constitutional theorists—grave weaknesses that help to justify judicial review. But Waldron argues that they actually are strengths. The reason for persistent ineradicable disagreement in the legislative process is simply the representative character of a legislature. It is *designed* to embody the full range of opinion in society, and in a society as diverse as that of the United States the range is so wide that the ends don’t, as it were, touch. The selection of representatives by popular election in different districts brings into the halls of the legislature advocates of irreconcilable opinions, and inevitably what emerges from the cacophony as the legislative product is often, perhaps characteristically, a product of compromise, polemic, and sheer electoral muscle rather than of consensus produced by reasoning from common premises toward common ends. Legislatures are representative to a degree that no single individual (the President) or small body of elected or unelected officials (a court) can be, and legislation is the solution to the problem posed by the fact that in a complex society people do not agree on ends. Waldron traces this idea back to the medieval concept of *lex terrae*, the “law of the land” that the king could change only with the consent of those of his subjects who constituted the political community of the nation. “[T]he community for which law is made is essentially plural, and in its essence incapable of representation by a single voice” (p. 60).

Waldron's conception of the legislative process explains the formality of the process—for example, the use of Robert's Rules of Order to structure discussion and voting—and hence its remoteness from “models [of deliberation that are] derived from ordinary conversation” (p. 70). The informality of conversation “tends to be predicated upon the idea that participants share implicit understandings and that their interaction is oriented towards the avoidance of adversarial disagreement and the achievement of consensus,” whereas “it is the task of modern legislatures to gather together large numbers of people who are not necessarily on casual ‘speaking terms’ with one another, and who participate in legislative deliberations not as individual conversationalists but as representatives” (p. 70) often of irreconcilable interests and points of view.

Immediately, Americans accustomed to taking judicial review for granted will perceive a disquieting resemblance between the legislative process described by Waldron and the judicial process. Courts too, as he emphasizes, decide questions by voting. And, as he neglects to mention, courts have their own formality, though it is not that of Robert's Rules of Order. Judges when deliberating rarely engage in free-form conversation. Instead they speak in turn in a sequence determined by seniority, they are careful not to interrupt each other, and the amount and intensity of discussion are inversely proportional to the depth of conviction that each judge brings to the particular question at issue. Compared to judges, juries, who wrangle for hours or days over a single case, are models of deliberativeness. Even when judges are elected (as most state judges still are) rather than appointed, they are not representative to anywhere the same degree, or in the same sense, as legislators; yet cases, like legislative proposals, often raise issues on which disagreement is rooted in differences in fundamental values or life experiences and is therefore unresponsive to argument. If the legislative process is not a satisfactory method of resolving fundamental disagreements, neither (prima facie at least) is the judicial; but if the legislative process is a satisfactory method of resolving such disagreements, then why do we need judicial review? This question is at the heart of Waldron's criticism of judicial review.

Waldron's answer to the question is that legislation is a satisfactory method for resolving disputes in spite of—indeed *because* of—its inability to achieve consensus. For it respects “differences of opinion about justice and the common good: it does not require anyone's sincerely held view to be played down or hushed up because of the fancied importance of consensus” and “it embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement” (p. 109).¹ When it comes to a choice between the policy choices of a modern legislature “familiar with the conditions of the society to which the statute is going to apply” (p. 122) and the policy choices of the Constitution's framers who “lived two centuries ago and,

1. Emphasis in original, as in all my quotations from Waldron's book.

despite their revolutionary virtue, . . . were utterly unacquainted with the conditions of modern politics and society in America," living as they did "in a loosely federated set of sparsely populated post-colonial white supremacist states, whose economies were based on the exploitation of African slaves in agriculture, and whose politics were confined to those who owned slaves, women, or property" (p. 123), Waldron is in no doubt as to which is preferable.²

From the fact that the enactment of a statute need not and typically does not reflect consensus, Waldron infers that a court in interpreting a statute should give no weight to the expressed intentions of any individual legislators. For they may have been opposed to the legislation or ignorant of the terms of the compromise that enabled it to be enacted. This is a point that was made long ago by interest-group theorists. They argued that to the extent that legislation is the product of the unprincipled deals of contending interest groups, reliance on "legislative history" may give victory in the courts to a point of view that had been rejected in the legislature.³ What is interesting about Waldron's adoption of this view is that, unlike most interest-group theorists (indeed, most constitutional theorists), he is, as we have seen, no cynic about legislation. He puts one in mind of earlier generations of political scientists, typified by Arthur Bentley⁴ and David Truman,⁵ who believed in the *goodness* of interest groups, arguing that their competition in the legislative process produced a social optimum. Waldron differs from them (he does not refer to them and may, for all I know, be unfamiliar with their work) in wanting to justify the legislative process in terms not of its outcome but of its inherent character, in respecting differences of opinion and so forth.

He does not condemn judicial resort to legislative history *tout court*. He accepts the possibility that if judges recognize certain types of statements found in legislative history (for example, statements found in committee reports that summarize the provisions of a bill for the information of the legislative house as a whole) as meaningful guides to legislative meaning, and if legislatures then respond to this recognition by authorizing the issuance of statements that are *intended* to be taken in this way, these statements become a kind of legislation. But he is adamantly against a court's relying on any statement by an individual legislator. I think he goes too far, and that it is more sensible for courts to adopt an attitude of suspicion toward such statements than to reject them out of hand. Not all legislation, let alone all provisions of every statute, reflects either an unprincipled compromise between interest groups or an arbitrary choice or compromise between persons or groups holding irrecon-

2. I do not, however, understand his reference to owning women.

3. See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 274-75, 278-79 (1982).

4. See Arthur F. Bentley, *The Process of Government* (1908).

5. See David B. Truman, *The Government Process: Political Interests and Public Opinion* (1962).

cilable fundamental values. Many statutes, like many (indeed most) judicial decisions, resolve technical issues or reflect consensus, and their character in this regard is apparent, yet sometimes they do so in language that is unintentionally opaque. There is nothing wrong in such a case with a court's searching the legislative history for clues in individual legislators' remarks to the meaning of the unclear text.

The central proposition of Waldron's book is that legislatures are arenas of intractable disagreement. Obviously this cannot by itself make the case *against* judicial review. Waldron is well aware that to do that he must counter the arguments of Rawls and others for a master theory of justice that a court could employ to resolve disagreements that legislators can only bracket by passing laws that give temporary victory to one side or the other but do not resolve the disagreement by determining which side is "right." Waldron points out that Rawls, though well aware of the intractable character of disputes over "the good," believes that all reasonable persons can be brought to agree "about the proper balance to be assigned in social life to their respective comprehensive conceptions" of the good (p. 152). That proper balance is given by Rawls's theory of justice. But, as Waldron points out, exactly the same uncertainties that make it impossible to achieve a consensus on the good make it impossible to achieve a consensus on the theory of justice. Not only will deeply religious people refuse to be persuaded that atheists have a superior conception of the good; they will refuse to be persuaded that secular theorists of justice like Rawls have a superior conception of justice. This is true irrespective of whether one believes, with the moral realists, that even the most difficult questions of moral concepts, such as that of justice, have right answers. That is an issue of ontology, whereas the critical issue is epistemological: How does one demonstrate the rightness of one's moral beliefs to skeptics? In the case of science (or, for that matter, in most domains outside of the moral), "[w]e know how to proceed in the face of disagreement" (p. 178)—and that is precisely what we don't know in the moral domain, as is shown empirically by the stubborn persistence of moral disagreement and theoretically by the fact that contending moral theorists proceed from different premises.

As Waldron points out, the indeterminacy of moral argument defeats the efforts of constitutional theorists to put judges on a higher plane than legislators. "If moral realism is true, then judges' beliefs clash with legislators' beliefs in moral matters. If realism is false, judges' attitudes clash with legislators' attitudes" (p. 184). "In the end it is moral disagreement, not moral subjectivity, that gives rise to our worries about judicial moralizing" (p. 187). "No matter how often or emphatically we deploy words like 'objective,' a claim about what justice *objectively* requires never appears in politics except as someone's view" (p. 199). Because moral disagreement is intractable, the task of achieving political fairness cannot be to find a master theory that will dissolve the disagreement. The task "is rather the elaboration of respectful procedures for settling on social action *despite*

the stand-off" (p. 196)—and those are the procedures employed by legislatures.

This point is obscured, Waldron believes, because theorists necessarily present their own theories as being correct, rather than simply as being "someone's view," namely their own. This makes it seem as if the task for social decision making is to pick the theory that is most likely to be correct and use that to orient decisions. But social decisions will lack legitimacy if they are based on conceptions of justice that many people reject. It is one thing to accept being outvoted; it is another to be told that one holds an erroneous view of justice. The legislative method of resolving disputes, which does not involve pronouncing one side of the dispute right and the other wrong, is more respectful of disagreement.

The first two-thirds of the book is designed as it were to restore the good name of legislation, and there are only glancing references to judicial review. The last third mounts an all-out attack on judicial review. Waldron's particular concern is whether England should adopt a judicially enforceable Bill of Rights, but there is much discussion as well of whether our Bill of Rights should be judicially enforceable. He answers "no" to both questions, which indeed he treats as one. Judicial review denies the people their "right to participate on equal terms in social decisions on issues of high principle and not just interstitial matters of social and economic policy" (p. 213). Waldron decries the tendency in a regime of judicial review to recast great issues of principle as points of legal "scholasticism" (p. 220), arguing that in a society that lacks judicial review, such as England, "people can discuss issues of rights and limited government, issues of abortion, discrimination, punishment, and toleration in whatever terms seem appropriate to them, free from the obsessive verbalism of a particular written charter" (p. 221). Since judicial deliberation isn't that different from legislative deliberation, the issue of judicial review is simply the choice between representative democracy and "judicial aristocracy" (p. 248).

Waldron points out that judicial review rests on an implausible, not to mention undemocratic, conception of human capacities—one that so elevates the theorist's own capacities and so denigrates those of the population at large "that any alternative conception [of how best to deal with some issue] that might be concocted by elected legislators next year or in ten years' time is so likely to be wrong-headed or ill-motivated that *his own* formulation is to be elevated immediately beyond the reach of ordinary legislative revision" (p. 222). Waldron points to the inconsistency involved in defending the right of free speech by reference to people's capability "of evolving a shared and reliable sense of right and wrong, justice and injustice, in their conversations with one another," and then turning around and "announc[ing] that the products of any deliberative process are to be mistrusted" (p. 222). The deeper contradiction is that since "the idea of rights is based on a view of the human individual as essentially a thinking agent" (p. 250), to place debate over rights outside

the democratic process—to place it in a judicial mandarin and thus deem questions about rights “too hard or too important to be left to the right-bearers themselves to determine, on a basis of equality” (p. 252)—is to deny the very premise on which the concept of a right is based. “If democratic politics is just an unholy scramble for personal advantage, then individual men and women are not the creatures that theorists of rights have taken them to be” (p. 304).

Against the view that judicial review is a precommitment device, by which the people (like Ulysses who had his crew bind him to the mast so that he could not yield to the Sirens’ irresistible but fatal singing) knowingly disable themselves from yielding to their vicious or ignorant propensities, Waldron argues that such protection is not needed in countries like the United States or England. In both countries “there are robust and established traditions of political liberty (which have flourished often *despite* the best efforts of the judiciary); and in both countries there are vigorous debates about political structure that seem able to proceed without threatening minority freedoms” (p. 281, footnote omitted). Against the view that judicial review is disinterested he argues that “[u]nless we envisage a literally endless chain of appeals, there will always be some person or institution whose decision is final. And of that person or institution, we can always say that since it has the last word, its members are *ipso facto* ruling on the acceptability of their own view” (p. 297). He points out that the net contribution of the Supreme Court to American liberty and welfare is uncertain, and he is properly dismissive of Dworkin’s argument that juridifying issues of principle improves the tenor of public debate:

My experience is that national debates about abortion are as robust and well-informed in countries like the United Kingdom and New Zealand, where they are not constitutionalized, as they are in the United States—the more so perhaps because they are uncontaminated by quibbling about how to interpret the text of an eighteenth century document. It is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of the scraps of some sacred text, in a tendentious exercise of constitutional calligraphy. . . . The exercise of power by a few black-robed celebrities can certainly be expected to *fascinate* an articulate population. But that is hardly the essence of active citizenship. (pp. 290–91)

Waldron’s book is long and dense and my summary of it has omitted a number of important points. But I hope that I have said enough, and quoted enough, to indicate not only the thrust of his argument but also its power. I find his general approach congenial, as anyone familiar with my own writings on constitutional theory will realize.⁶ I have, however,

6. See Richard A. Posner, *Overcoming Law* 169–255 (1995); Richard A. Posner, *The Problematics of Moral and Legal Theory* (1999) [hereinafter Posner, *The Problematics of*

several criticisms (apart from some minor points, such as the weight that a court should give in interpreting a statute to statements by individual legislators). Some of these reflect the fact that the outsider's perspective that is such a valuable feature of the book is also a shortcoming. For example, Waldron is not as familiar with the American tradition of skepticism about constitutional review (which runs from Thayer to Holmes to Hand⁷ to Frankfurter and the legal realists and latterly to crits and post-crits such as Jack Balkin and Mark Tushnet, to Michael Klarman, and to Robert Bork), the American literature on the legislative process, or the American institutional texture, as he would be had he been educated in this country. I mentioned Bentley and Truman, who do not appear in his book, and here I add that the economist Gary Becker, who also does not appear, has made a point that resonates strongly with Waldron's position: it is that interest-group politics allows *intensity* of preference to register in the legislative process (just as in the market), which simple voting does not;⁸ the apathetic voter's vote is weighted equally with that of the voter who is intensely interested in a particular issue or candidate. Waldron could also derive support for his position from Bruce Ackerman, who argues that some legislation—legislation enacted in periods of unusually intense popular attention to issues of public policy—deserves parity with the Constitution;⁹ Ackerman goes as it were halfway to Waldron's position.

A particularly significant omission is Waldron's failure to engage seriously with John Hart Ely's "representation-reinforcing" theory of judicial review. Ely's theory, mentioned by Waldron only in passing, is that judicial review can enhance the democratic legitimacy of legislation, for example when it sweeps away arbitrary obstacles to the franchise or requires the reapportionment of malapportioned legislative districts that create arbitrary inequalities of voting power.¹⁰ Waldron refers obliquely to Ely's argument by criticizing a version of it put forth by Dworkin (Waldron's favorite whipping boy, along with Rawls), who thinks that "courts are reliable at making good decisions about democracy" and that "[t]hat is all a partisan of democracy should care about" (p. 292). Waldron argues that when a democratic issue is settled undemocratically, as by a court wielding the power of judicial review, there is a loss in self-government even if the court got it right. This is true, but the loss ought to be weighed

Moral and Legal Theory]; Richard A. Posner, *Appeal and Consent*, New Republic, Aug. 16, 1999, at 36 (reviewing Mark Tushnet, *Taking the Constitution Away from the Courts* (1999)).

7. Hand's position seems especially close to Waldron's. Hand famously said that he would not like to be "ruled by a bevy of Platonic Guardians" because he would "miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs." Learned Hand, *The Bill of Rights* 74 (1958).

8. See Gary S. Becker, *Public Policies, Pressure Groups, and Dead Weight Costs*, 28 J. Pub. Econ. 329 (1985).

9. See 1 Bruce Ackerman, *We the People: Foundations* (1991).

10. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

against whatever gain the court's ruling brought about; and this Waldron fails to do.

The deeper problem with Waldron's response to Ely is that it involves bootstrapping. Democratic choice is used to validate democratic choice. But suppose that Congress voted to confine the franchise to persons having a net worth of at least \$1 million. It would be difficult to justify the democratic character of the Congress elected under the new, restricted franchise by reference to the fact that the restriction had been adopted democratically. Waldron can be criticized, therefore, for lacking a theory of democracy,¹¹ that is, a theory that would explain what specific rules and institutions relating to voting, districting, legislative procedures, legislators' qualifications, frequency of election, and the like are necessary in order for the legislative product to be deemed democratic.

Waldron also appears to be unaware that most American judges, including most appellate and even supreme court judges, are elected rather than appointed, and he does not consider whether elected judges might have a greater legitimacy in exercising the power of judicial review. He does not consider the significance of the fact that federal judges, although not elected, are appointed by an elected official, the President, with the advice and consent of a representative legislative body, the Senate. He considers only judicial review of statutes, and without distinguishing between state and federal statutes, though the arguments pro and con judicial review are not necessarily of equal strength for both types of statutes. None of these are features of English practice, which is the implicit, and in some respects a too narrow, context for much of his discussion. He does not consider the case for judicial review of executive or administrative action, as distinct from legislative.

Here is another respect in which Waldron, in my opinion, gives insufficient attention to the actualities of American judicial practice: Recognizing that "inconstancy" is a real danger of the legislative process, he acknowledges that the process may rightly "be made more complex and laborious, and in various ways it may be made difficult to revisit questions of principle for a certain time after they have been settled . . . ; certainly a 'slowing-down' device of this sort is not like the affront to democracy involved in removing issues from a vote altogether and assigning them to a separate non-representative forum like a court" (pp. 305-06). But "slowing down," or occasionally speeding up, may be a realistic description of most of what the U.S. Supreme Court has done with its power of judicial review.

A related criticism is that Waldron is not sufficiently realistic about the legislative process. He has too starry-eyed a view of it. He says that the right model is not an "unholy scramble for personal advantage" (p.

11. A criticism frequently made, whether or not justly, against Ely. See, e.g., Cass R. Sunstein, *The Partial Constitution* 143 (1993). Much of Sunstein's book is designed to repair what he believes to be the undertheorized character of Ely's theory of judicial review. Waldron cites Sunstein's book (p. 279) but does not discuss it.

304) but rather “a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what’s in it for them but by a desire to get it right” (p. 305). This is as unrealistic a picture of the legislative process as is the corresponding roseate view of courts that Waldron demolishes. He offers no justification for this picture or for the idea that people of diverse perspectives “are capable of pooling these perspectives to come up with better decisions than any of them could make on [their] own” (p. 72). This pious proposition is in unresolved and unacknowledged tension with the more realistic view, which is implicit in much of what Waldron has to say about the limitations of reasoning in bridging fundamental disagreements, that deliberation among people with such disagreements will tend to entrench rather than to dissolve their disagreements.¹² And it is no argument at all that if we are going to be cynical about legislators, we shall have to be cynical about the opinions of judges, about constitution-framers, and about ourselves (p. 230). We should be cynical about all three groups and design our institutions accordingly. Or realistic—and realism would include recognizing that federal judges are insulated from most of the political pressures that beset elected legislatures; that these pressures sometimes reflect selfish, parochial interests, ugly emotion, ignorance, irrational fears, and prejudice; and that the judges’ insulation, together with the traditions and usages of the bench and the fact that the higher federal judges are screened for competence and integrity, may confer on the judiciary a power of detached and intelligent reflection on policy issues that is a valuable complement to the consideration of these issues by the ordinary lawmakers. It is even possible that an appointive judiciary such as the federal may give representation to interests that the electoral process ignores because they are not in coalition with any politically effective group. There are many judges who could not be elected to Congress, and their presence in the overall policy-making apparatus of government may increase both the diversity and stability of the political process. Waldron also does not give as much weight as he should to Benjamin Constant’s distinction between the liberties of the ancients and the liberties of the moderns. The former secure the right to participate in government, the latter the right to be left alone by government, and the reason for the difference is simply that in a complex modern society (in contrast to the ancient city-state) the practical opportunities for participation in government are very small.

12. The scholarly literature on group polarization and confirmation bias supports this gloomy view of the effects of deliberation. See, e.g., Markus Brauer et al., *The Effects of Repeated Expressions on Attitude Polarization During Group Discussions*, 68 *J. Personality & Soc. Psychol.* 1014 (1995); David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 *Psychol. Bull.* 602 (1976); Matthew Rabin, *Psychology and Economics*, 36 *J. Econ. Literature* 11, 26–28 (1998); David Schkade et al., *Deliberating about Dollars: The Severity Shift*, 100 *Colum. L. Rev.* (forthcoming May 2000).

My last criticism is that Waldron exaggerates the power of political philosophy to settle disputes over political institutions. The only thing that analytic moral and political philosophy (as opposed to philosophizing of an inspirational or quasi-religious character, which seeks to present and describe a way of life) can do is knock down bad philosophical arguments.¹³ At that level, Waldron's book is a complete success. He shows that the philosophical arguments for judicial review mounted by Dworkin and Rawls and others are unsound. What he may not realize he can't do is establish by philosophical arguments that judicial review is a bad thing. That he discusses in the same breath as it were the case for judicial review in the United States and the case for judicial review in England is a clue to his oversight. There is no reason to suppose that the issue should be resolved the same way in two different countries, even countries that share the same language and the same basic legal and political heritage. That depends on all sorts of empirical questions and judgmental imponderables involving the political and legal cultures of the two countries and the career paths of legislators and judges in them. So far as the American scene of judicial review is concerned, the question whether judicial review has been on balance a good thing for America may be the only question worth asking once the detritus of philosophers' arguments is swept off the table. Waldron has done a good job of sweeping.

13. That is the theme of the first chapter of Posner, *The Problematics of Moral and Legal Theory*, *supra* note 6.