

Can Raz's Pre-Emption Thesis Survive under a Dworkinian Theory of Law and Adjudication?

¿Puede la tesis del reemplazo de Raz sobrevivir en el contexto de una teoría dworkiniana del derecho y de la adjudicación?

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Abstract: Margaret Martin's *Judging Positivism* provides one of the best reconstructions and some of the most intriguing criticisms ever raised to Joseph Raz's influential jurisprudence. In one of the central moves of her argument, Martin challenges a core tenet of Raz's jurisprudence, which is the attempt to combine the preemption thesis with the normal justification thesis. While the former requires citizens and officials to exclude from deliberation any first-order reason for action a person may have, the latter invites considerations of legitimacy that cannot be assessed with independence from the first-order reasons the preemption thesis was meant to exclude. In this critical comment, I grant Martin's critique that these two theses cannot be accepted as conceptual claims. Nevertheless, I suggest that there remains some room to harmonize the two theses if they are accepted on normative grounds. If there is a good normative argument to treat legal reasons as an intermediate level of reasons for action, there may be some circumstantial reasons for treating institutional reasons as preemptive in the sense that Raz defends in his general theory of law.

Keywords: Raz, preemption, normal justification thesis, Dworkin, normative positivism.

Resumen: *Judging Positivism*, de Margaret Martin, provee una de las mejores reconstrucciones y una de las más interesantes críticas planteadas hasta ahora contra la influyente filosofía del derecho de Joseph Raz. En uno de los pasos centrales de su argumento, Martin desafía un aspecto central de la teoría del derecho de Raz, que es el intento de combinar la tesis del reemplazo con la tesis de la justificación normal. Mientras la primera exige que ciudadanos y funcionarios excluyan de la deliberación cualquier razón de primer orden para la acción, la última invita a consideraciones sobre legitimidad que no se pueden realizar con independencia de las razones de primer orden que la tesis del reemplazo pretende excluir. En este comentario crítico, yo acepto la crítica de Martin según la cual esas dos tesis no pueden ser aceptadas como argumentos conceptuales. Sin embargo, sugiero que aún existe un espacio para armonizarlas si se las acepta por razones normativas. Si hay un buen argumento para tratar razones jurídicas como un nivel intermedio de razones para la acción, entonces puede haber buenos argumentos

circunstanciales para tratar razones institucionales como remplazantes en el sentido defendido por Raz en su teoría del derecho.

Palabras clave: Raz, reemplazo, tesis de la justificación normal, Dworkin, positivismo normativo.

I. Martin's Critique of the Service Conception

One of the most challenging arguments presented in Margaret Martin's insightful book *Judging Positivism* is the claim that Joseph Raz's jurisprudence may collapse into a Dworkinian account of law and adjudication. According to Martin, Raz argued in *Practical Reason and Norms* that judges are by the nature of their office morally obliged to apply the law: "at the centre of his [Raz's] account is the thesis that judges have a duty to apply the law" (Martin, 2014, p. 15-16). Nonetheless, in later work he no longer accepts this view and becomes vulnerable to an important objection. Indeed, in Raz's more recent conception of legal reasoning, one must resort to *extralegal* considerations (and in particular to moral considerations) in order to determine the normative force of a given norm. In many cases, such as the common law cases in which one can distinguish a case under analysis from a precedent, judges can carve exceptions on legal rules if they are convinced that following the precedent would make it difficult to comply with one's appropriate reasons for action (Martin, 2014, pp 33-36). This leads to the following dilemma: Raz's advice to find exceptions in legal rules on the basis of moral reasons is inconsistent with the original account that he provided to explain the nature or essential features of law. In a nutshell, Martin's point is that Raz's theory of law – which identifies the content of a law by an amoralistic observation of the social facts that constitute the source of a legal rule – is inconsistent with his theory of adjudication, which requires that judges decide cases not only with the protected reasons that Raz classifies as legal, but also with the help of extralegal considerations that provide a justification for the creation of a novel norm. Thus, Raz's theory of adjudication requires a morally robust process of interpretation, which appeals to something like Ronald Dworkin's model of constructive interpretation (Martin, 2014, pp. 40-43).

In this comment I will not challenge this position. I grant that Martin is correct about this argument and explore whether it implies a more general claim, which Martin puts forward in the fourth chapter of the book. Martin argues in this chapter that two central theses of Raz's service conception of authority undermine each other, creating a consistency issue in the account of authority provided in his seminal work *The Morality of Freedom*. These two theses are the Normal Justification Thesis and the Pre-emption Thesis, which are enunciated thus:

Normal Justification Thesis: “the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him ... if he accepts the directives of the alleged authority as binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly” (Raz, 1986, p. 53);

Preemption Thesis: the reasons of an authority replace the first order reasons that a subject might have to act in a certain way, preempting the “background reasons that might militate against the authoritative directives” and replacing them “with their own requirements” (Raz, 2009, p. 141).

Under Raz's conception of authority the purpose of an authority is to “secure conformity with reason”, i.e., to improve our capacity to act on the right reasons for action that we have in a certain context (Raz, 2009, p. 139). But the way in which an authority can facilitate one's action in accordance with the right reasons for action is by approaching them indirectly. For the preemptive thesis, an authority cannot succeed in its purpose if it fails to make us “follow their instructions rather than the background reasons” on which they are based (Raz, 2009, p. 141). An essential part of the nature of authoritative directives is that they *replace* our reasons for action. To act as an authority, one must utter reasons that “replace people's own judgment on the merits of the case.” The authority mediates, therefore, between “deeper-level considerations and concrete decisions”, providing an “intermediate level of reasons to which one appeals in normal cases where a need for a decision arises” (Raz, 1986, p. 58).

Despite being based on the reasons that they replace, authoritative directives cannot be balanced against these reasons. An authority's directive is presented as not merely a reason to be added to these reasons, but rather as based on them, “to sum them up and to reflect their outcome” (Raz, 1986, p. 41). We must not, therefore, count the same reason twice: “Either the directive or the reasons for holding it to be binding should be counted but not both. To do otherwise is to be guilty of double counting” (Raz, 1986, p. 58). When one follows a legitimate authority, one must *replace* one's dependent reasons (the first order reasons which directly apply to one) with the authority's directive, for this indirect intentional action constitutes the most appropriate way to track one's reasons for action. But how is one to determine whether a person or institution acted as a legitimate authority?

One of the interesting points about Raz's theory is that it lacks a general answer to this question, for there is no general obligation to abide by an authoritative pronouncement. Following an authority is morally justified only (and for) as long as it serves the interests of the governed, i.e., for as long as following the authority makes the subject more likely to act for the right reasons in the current case. On Raz's conception of authority, each person must determine according to her own judgment whether this is the

case. In the case of political authorities, for instance, the following test applies: “Does following the authority’s instructions improve conformity with reason?” (Raz, 1986, p. 74). Nonetheless, Raz’s test is incomplete, since “for every person the question has to be asked afresh” (Raz, 1986, p. 74). Every person has both the right and the responsibility to assess by her own judgment whether she is under an authoritative pronouncement that deserves to be followed, i.e. whether the directive provides a sound preemptive reason for acting in a certain way.

The objection that I want to address in this article precisely challenges this point. It argues that there is no way to combine the preemption thesis and the normal justification thesis, and that Raz should be forced to choose only one of them:

The tension between the preemption thesis and the normal justification thesis is apparent when one bears in mind that for Raz, only morally legitimate legal norms have preemptive force. Indeed, when explaining the preemptive thesis, he states that only legitimate directives provide us with reasons for action. Consequently, the *very act of determining whether the norm meets the normal justification standard undermines the preempting force of the norm(s) in question* (Martin, 2014, p. 77).

Martin believes that Raz’s conception of authority fails in its own terms, given that the two theses which make up the conception are irreconcilable. Raz’s theory of the authority of law is conceptually incoherent, because one can only accept one of these theses at the expense of the other: “The preemption thesis requires a pre-commitment to authority while the normal justification thesis invites us to evaluate the reasons behind the rule” (Martin, 2014, p. 81).

One should notice, however, that Raz anticipated this objection, in the following terms:

It [the objection] says that in every case authoritative directives can be overridden or disregarded if they deviate much from the reasons which they are meant to reflect. It would not do, the objection continues, to say that the legitimate power of every authority is limited, and that one of the limitations is that it may not err too much. For such a limitation defeats the preemption thesis since it requires every person in every case to consider the merits of the case before he can decide to accept an authoritative instruction (Raz, 1986, p. 61).

As Raz acknowledges, the target of the objection is the *mediating role* assigned to the authority. Even though authorities claim to give us “non-ultimate reasons”, the fact that the legitimacy of an authority is open to scrutiny under the normal justification thesis makes it impossible for people to rely only on such mid-level reasons: “as the directives are binding only if they do not deviate much from right reason and as we should act on them only if they are binding, we always have to go back to fundamen-

tals" (Raz, 1986, pp. 61-62). According to the objection, therefore, the option to rely on authoritative instructions as placed on an intermediate level where they can play a mediating role is no longer obtainable (Raz, 1986, p. 62).

Raz answers to the objection with an interesting distinction about the types of mistakes an authority can make. He holds that the mistakes which can render an authority illegitimate belong to a special class, which he names as "jurisdictional" mistakes. Jurisdictional mistakes are not "great" mistakes, which can be measured with the same scale that we use to assess the weight of the background reasons on which they rest. They are, rather, mistakes about the "factors which determine the limits" of the jurisdiction of an authority and thus "render [her] decisions void" (Raz, 1986, p. 62). The distinctive feature of jurisdictional mistakes, for Raz, is that unlike other types of mistakes they are capable of affecting the binding force of authoritative directives. As Timothy Endicott explains, "the jurisdiction of an authority determines not only whom it can address and what actions it can direct, but also what considerations it can exclude" (Endicott, 2007, p. 15).

Raz's argument depends, therefore, on the conceptual possibility of *distinctively jurisdictional* mistakes, which would be the only kind of mistakes that are capable of rendering an authoritative pronouncement void.¹ Why can Raz think that these are the only kind of mistakes that could dismantle the force of an authoritative pronouncement? Does it make sense to make this kind of argument?

I believe that this is the source of an important disagreement between Raz and Martin. According to Martin, there are no distinctively jurisdictional mistakes: Raz's argument only preserves the preemption thesis at the expense of the normal justification thesis. According to the normal justification thesis, the way to assess whether an authority is legitimate is by checking whether it helps a subject to act in accordance with the right reasons for actions that she has. Although this purports to be a content-independent test to determine the legitimacy of an authoritative directive, there is no way to evaluate this legitimacy without balancing the second-order reasons generated by the authority against the first order reasons on which the authority based her decision. Raz's preemption thesis, therefore, must be justified by something more robust. Raz must be appealing to a *consent theory* of legitimacy, which can only save the preemption thesis by discarding (or at least neutralizing) the normal justification thesis. "Implicit in Raz's argument is the claim that a pluralistic community cannot persist unless all members consent to obey the law regardless of whether or not the directives meet the normal justification standard" (Martin, 2014, p. 86). Let me try to rescue Raz from this criticism in the next section.

II. Endorsing the Pre-Emption Thesis on Normative Grounds

To begin, I need to explain the title of this essay. Why – you might be arguing – should one resort to Dworkin’s theories of law and adjudication to rescue the theory of authority of Raz? The reason I refer to Dworkin is that I granted that Martin is right when she claims that Raz’s theory of legal reasoning and adjudication leads his jurisprudence to collapse into a form of Dworkinian interpretivism. Consider, for instance, Raz’s claim that in common law cases judges can resort to moral reasons to create an exception to the application of a precedent to the current case. In order to distinguish a precedent, judges should both (1) restate the rule contained in the ratio of such precedent; and, (2) add an exception to cover the case which they think should no longer fall under the scope of the distinguished rule. But as soon as a judge attempts to do it she becomes distant from the positivistic legal account that Raz offered in his jurisprudence:

In response to the problem of how one chooses between the various rules that meet the two conditions listed in the rule-plus-exemption model of adjudication, Raz insists that “The court’s obligation ... is to adopt only that modification which will best improve the rule”. The decision must both “fit” Raz’s two conditions and be “justified” in reference to its competitors insofar as the option chosen must improve the rule. Given this characterization of judicial interpretation, Raz, it seems, becomes Dworkin in a fundamental way (Martin, 2014, pp. 40-41).

If we grant, *ad arguendo*, that Martin’s objection is sound, an immediate implication is that Raz’s defense of the preemption thesis and the normal justification thesis can no longer be presented as a conceptual claim. In effect, one of the central points of Dworkin’s jurisprudence is that the construction of legal concepts is moralized and interpretive all the way down.

This was not, of course, the way that Raz presented his theory of authority. When Raz argued that authoritative directives have preemptive force over their subjects, he presented this thesis as part of an explanation of the nature of authority i.e., of the necessary and sufficient conditions an authority must satisfy to be recognized as such. As Dworkin explains, Raz presents this account “not as a recommendation of deference to constituted authority that people are free to accept or reject but as a conceptual truth.” In other words, “it is part of the essence of authority” that it provides preemptive reasons for actions, in such a way that “it follows from that conceptual truth ... that nothing can count as law if citizens must use moral judgment to identify its content” (Dworkin, 2006, p. 206).

The way that Raz presents his account of authority is very demanding, for it must overcome the burden of demonstrating that all alternative explanations of the character and force of legal reasons are *conceptually* wrong. I believe that Raz cannot get rid of

this argumentative burden (Dworkin, 2006, p. 209). But what happens if we accept Raz's two theses (the preemptive thesis and the normal justification thesis) on *normative* grounds? What if we read his account of authority as itself an *interpretive* theory of the character of law?

If we accept Raz's conception as a *normative* conception, some of these worries disappear. Practical authority may become, under certain conditions, an attractive idea, insofar as subjects may lack legitimacy to correct an authority's non-jurisdictional mistakes. In this case, we would have to rephrase the basic question in the following way: Are there moral reasons to treat certain pronouncements as preemptive? Or, alternatively: Should we conceive the law as stipulating an intermediate level of reasons which are capable of mediating between an agent and her background reasons for action?

As soon as we re-conceptualize these questions it becomes clear that Raz's preemption thesis can be more successful if it is interpreted as a form of normative positivism.² But I guess there is more to this suggestion. Why should one think that it is conceptually impossible to reconcile this position with the normal justification thesis? From the analytical point of view, there is no reason to think that the normal justification thesis remains incompatible with the preemption thesis. To understand this point, we must return to the concept of "jurisdiction" and the correlated idea of jurisdictional mistakes.

It might be possible, for instance, to apply the normal justification thesis to conclude that there are certain jurisdictional reasons to attribute to some person or institution an exclusive power to make a judgment on certain issues. Perhaps an argument can be made to the effect that the best way to track reason is to attribute to this person or institution a preemptive authority to resolve certain matters, even if this decision comes with the price that this person or institution's non-jurisdictional mistakes are tolerated by the rest of us.

Is this hypothesis conceptually possible? I can find no reason to give a negative answer to this question. Why should we claim that it is a conceptual truth that under no circumstance an argument can be adduced to the conclusion that a certain person or institution has the power to enact preemptive reasons over a certain agent? Why must we conclude that the normal justification thesis would never recommend adopting this conclusion in a certain case? Perhaps there is a more charitable answer to Raz's contention that we can use the normal justification thesis to determine the jurisdiction of preemptive authoritative pronouncements. To vindicate this answer, we must establish

the possibility of an “intermediate level of reasons to which one appeals in normal cases where a need for a decision arises” (Raz, 1986, p. 58).

Let us consider an example that might demonstrate this possibility. Consider the case of presidential impeachment processes. In the 2016 impeachment of President Dilma Rousseff, in Brazil, most lawyers maintained that the Senate’s decision to oust Rousseff from the presidential office was substantially wrong and unfair. Almost all decent academic lawyers in Brazil found that the impeachable offenses were non-existent and that the president committed no wrong that would justify the extreme measure of removing her from a duly elected office.³ Even the Vice-President Michel Temer, who took her office after the impeachment trial and formed a cabinet with Rousseff’s fiercest political opponents, to implement a set of policies directly opposed to Rousseff’s governmental agenda, described the trial (in a recent interview) as a “coup”, and said that he neither supported the impeachment nor had any responsibility for its outcome (Uol Notícias, 2019). In a similar way, in another interview a few months after the trial, counselor Janaina Paschoal, who wrote the petition accusing Rousseff of the impeachable offenses, admitted that Rousseff was *not* removed from office for the reasons that were provided in her petition or in the Reporting Senator’s opinion presented at the trial. Yet very few people argued that these legal mistakes rendered the decision void.⁴

Does it make sense to say that the legislative decision was *legally wrong* while not subject to judicial review? I can see no contradiction in these thoughts. There are important reasons why even some of the most stringent opponents to Rousseff’s conviction thought that despite its wrongness the Rousseff impeachment must prevail. Most of these reasons could be classified as “jurisdictional reasons” in Raz’s sense. When the Brazilian Supreme Court claimed that it lacked legal powers to review the merits of this process, one could perfectly say that the reason for upholding the Senate’s trial is that the Senate made *no jurisdictional mistake* in the sense of Raz. It could be argued, for instance, that the Senate was acting within the limits of its authority and that the normal justification thesis recommends that we recognize this jurisdiction even if we are convinced that the Senate’s decision is incorrect.⁵

Perhaps an assessment of the matter under the normal justification thesis can lead to the conclusion that the proper way for a community to act in accordance with the best reasons is to uphold the Senate’s decision, given that any attempt to reform this decision by other institutions or by private agents would lead to even more serious consequences for the parties at stake. Suppose a justice in a supreme court is faced with a claim to annul an impeachment trial on the ground that its result was substantially

wrong. If she believes a decision to annul the trial would produce dangerous systemic effects, leading to a serious degree of politicization of the Judiciary or a severe breach of the separation of powers, inasmuch as other judges might be encouraged to discuss the merits of legislative proposals and political judgments, perhaps the best moral and legal decision would be to rely on Raz's conception of authority and tolerate any mistake that is not a *jurisdictional* mistake about the legitimacy of the political institution at stake.

Although jurisdictional decisions can be based on several kinds of reasons, including moral reasons, once these decisions are made, they grant to the authority the right to enact preemptive reasons that will stand even if they are substantially wrong.⁶

Are there other examples of this kind of preemptiveness, apart from the unusual case of impeachment processes? Perhaps we can provide a further and less exceptional example of a jurisdictional argument to ground the conclusion that certain institutions can have preemptive authority in a more ordinary case. Consider Raz's example of tax laws. Suppose we have a reason to contribute to the maintenance of our political community, and that we benefit from the existence of political institutions, public services, the coercive protection of legal rights, and so on. Do we have a reason to pay taxes to keep these institutions running? Suppose a parliament is elected and it is part of the duties of this parliament to pass laws creating a tax scheme and making a distribution of the "burden of taxation in an equitable way" (Raz, 1986, p. 43). Do we have a reason to pay a specific amount of tax before this parliament creates the tax scheme? The answer is probably "not", although *after* a statute is enacted, we are probably more confident that we *do* have a preemptive reason to pay the taxes in the amount fixed by legislative scheme, even if we are convinced that the overall scheme is substantially unfair.

Suppose we live under a reasonably decent society, with the protection of basic liberties and some important public services, but we are convinced that the distribution of the tax burden is suboptimal because it is unfair. Wouldn't this be a case in which one may think that we have a preemptive reason to pay the tax, no matter how strongly we think that the scheme is unjust and must be reformed in the future?

Suppose we think that the scheme is unfair but that no other institution is more legitimate than parliament to fix the general distribution of the tax burden, and that we are committed to the benefits that the democratic legislative process generates to the political community. Could not we say that the normal justification thesis generates conclusive reasons to uphold this tax scheme even if we think that it is somehow sub-

stantially mistaken? If the answer is yes, then Raz's distinction between jurisdictional and non-jurisdictional mistakes still holds. It is possible that there is, in fact, a relevant set of cases in which 1) the preemptive thesis is compatible with the normal justification thesis; and, 2) we have, even under a non-positivist general theory of law, reasons to treat *certain parts* or branches of the law, or *certain specific authorities*, in well-defined circumstances such as the distribution of tax burdens and the decisions of conflicts among branches of government, as providing preemptive reasons for action.

There is, therefore, a conceptual space for preemptive reasons for action even in a Dworkinian theory of law. If we grant that Dworkin's theory of law provides a sound general account of legal systems but there are *specific parts* of these systems (such as processes about conflicts between branches – like presidential impeachment trials – and processes of distributing collective burdens by democratic means – like the enactment of tax laws and the creation of a tax scheme) that cannot be explained by this general account, we may still believe that there is room for preemptive reasons even under that theory. There remains a conceptual space for the application of the normal justification thesis to determine whether we have a duty to abide by the preemptive pronouncements of certain political institutions.⁷

I hope that it is clear, however, that these conclusions have a limited scope. If Martin is right and Raz's theory of law collapses into a Dworkinian interpretivism, then the general rule will be that lawyers, citizens and officials will have the general responsibility to interpret the law according to "law as integrity". Constructive interpretation will still be the rule. If there is a conceptual space for preemptive reasons in legal reasoning, this space will be constrained to the cases in which a particularly demanding interpretation of principles like the separation of powers is justified. If this is the case, one must make a moral case to demonstrate, perhaps with the help of the normal justification thesis, that these circumstances are present in the case at hand. So, to conclude, even if Martin's thesis that Raz's theory of adjudication collapses into Dworkinian interpretivism makes sense, with the implied conclusion that part of what Raz wrote in *Practical Reason and Norms* must be revised, there is still a (limited, but not irrelevant) role for preemptive reasons in practical reasoning, and it is still possible to imagine a conceptual space for harmonious coexistence of the preemptive thesis and the normal justification thesis. The preemption thesis and the normal justification thesis are not conceptually incompatible, as it may seem.

III. Conclusion

Judging Positivism is distinctively successful in clarifying the development of Raz's accounts of law and interpretation, with a systematic reconstruction of the main changes in his views over a long and prolific career. It depicts an important shift in Raz's ideas on authority and on law's ability to generate practical reasons for officials and the population at large. While in *Practical Reason and Norms* officials are regarded as under an obligation to obey the law, in later works Raz opens a gap between his theory of law – which concerns the identification of the content of legal assertions – and his theory of adjudication, which is concerned with the explanation and justification of the adjudicative decisions of officials. What matters in Raz's later jurisprudence is its account of legal reasoning, that includes both source-based reasons (or “legal” reasons in a strictly positivist sense) and “extralegal” considerations about political legitimacy and substantive matters of public morality.

My analysis concludes that Martin has successfully established that Raz's theory of legal reasoning, as reasoning “from the law” instead of reasoning “about the law”, creates an internal tension for the “service conception” of legal authority. Nonetheless, there is no conceptual incompatibility between the preemptive thesis and the normal justification thesis. Even if, as Martin believes, Raz's account of legal reasoning entails a Dworkinian theory of adjudication, there remains a conceptual space for jurisdictional reasons and for certain areas of law in which preemptive force can be attributed to a particular class of legal statements. There might be areas of law, like tax laws or criminal laws or laws about the legislative competence of parliament, in which Raz's preemption thesis still holds. Whether it is the case that we should read these laws as preemptive reasons for action is an interpretive matter, which goes beyond the scope of this short comment. This interpretive matter is ultimately a normative issue. It must be resolved by an evaluative judgment, rather than on conceptual grounds.

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Notas

- 1 This interpretation is controversial, despite the textual support provided above. Nicole Roughan, for instance, argued in response to Martin that the pre-emption thesis requires only "identifiability or reasonable knowability of the legitimate authority, which is not the same thing as a pre-commitment to authority" (Roughan, 2016, p. 157). I think that Martin's interpretation of the pre-emption thesis is more appealing, however, because it retains an interesting practical difference between the jurisprudences of Raz and Dworkin. If Roughan's reading prevails, Raz's jurisprudence can be saved only at the price of making it a mere terminological disagreement with Dworkin. As Liam Murphy explained, if we reduce the controversy between positivists and non-positivists to a conceptual debate about the kinds of facts that can count as a ground of law (whether social facts only or moral facts together with social facts), with no implication for the practical attitude of participants in social practices, it is difficult to conceive of an argument that can lead "either side to give up its foundational commitment" (Murphy, 2014, p. 3). The important question is not the "conceptual" question that puts apart positivists and non-positivists, but rather the normative question of how people ought to respond to legal reasons: "more important than law's expressive function is the role of law in people's practical lives" (Murphy, 2014, p. 91). One should construct a concept of law, therefore, with this crucial role in mind.
- 2 Jeremy Waldron's normative positivism is based, for instance, on the claim that "the values associated with law, legality and the rule of law – in a fairly rich sense – can be best achieved if the ordinary operation of such system does not require people to exercise moral judgment in order to find out what the law is" (Waldron, 2001, p. 421).
- 3 Several legal opinions by Brazilian scholars were offered as expert evidence, describing serious procedural and substantive vices in the trial. See, for instance, the expert assessments by Neves (2015), Serrano (2016), Ribeiro (2015), Bercovici (2015) and Bustamante (2018, pp 52-109).
- 4 For a different view, accepting the legitimacy of judicial review when there is no cause of action for the impeachment trial, see Bahia *et al.* (2018).
- 5 This is, in effect, Dworkin's position. Writing about Clinton's impeachment, Dworkin argued that impeachment trials provide politicians the "means to shatter the most fundamental principles of our constitutional structure". Even when congressmen abuse this "terrible power", nothing can stop them: "No court can review their proceedings, their declaration, or their verdict. No public outcry can stay in their hand. Nothing can stop them but their own constitutional conscience" (Dworkin, 1999).
- 6 When interpreted as a normative claim, Raz's preemption thesis is hardly distinguishable

from Jeremy Bentham’s “motto of the good citizen”, which is “to obey punctually [and] censure freely” (Bentham, 1977, p. 399). Bentham’s argument has, however, a broader scope than the possibility entertained here, since it purports to apply as a general standard.

- 7 I entertained this possibility, for instance, in a comment on Dimitrios Kyritsis’s Dworkinian approach to interpret the principle of separation of powers: “It does not appear to be contradictory... to support a conventionalist interpretation of the jurisdictional rules that define the competences of courts and parliaments while advocating a full-blooded interpretivism with regards to the provisions of the constitution that fix the rights people have in a constitutional democracy” (Bustamante, 2017, p. 651).

Submission: August 23, 2021
Acceptance: September 2, 2021