

DEMOCRACY AND DISAGREEMENT: A COMMENT ON JEREMY WALDRON'S *LAW AND DISAGREEMENT*

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I am very pleased to be here today for this symposium on Jeremy Waldron's important book, *Law and Disagreement*. I thank the *Journal of Legislation and Public Policy* for organizing this terrific event and for inviting me to participate in it. I especially thank all of you in the audience for sitting inside on this warm Friday afternoon in November, one that might, given the date, be the last warm afternoon of the year. Most importantly, I would like to thank Jeremy Waldron for writing a delightfully engaging, provocative, and profoundly thoughtful book. I first encountered this book when Waldron presented portions of it here at N.Y.U. a few years ago, and his arguments have had a substantial impact on the way that I think about constitutionalism and judicial review. Waldron's insights have, however, led me to conclusions different from his own — indeed, my conclusions are so different that I fear Waldron may find himself wishing that his arguments had influenced me less!

My plan is as follows: I will distinguish two different strands of Waldron's argument. I will criticize one strand and praise the other, and then lodge an objection to the stronger strand. More specifically, I will contend that Waldron underestimates the institutional complexity of constitutional self-government.

Let me begin where Waldron does, with the philosophy of Thomas Hobbes. Waldron uses a quotation from Hobbes as the epigraph for his book.¹ As many of you will recall from your undergraduate educations, Hobbes recommended that power be vested in a single absolute sovereign who, by virtue of his undivided power, could settle any dispute and so secure peace. The classic Hobbesian argument goes roughly like this:

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1. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (citing THOMAS HOBBS, *LEVIATHAN* 28 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651)).

All men and women think they know what justice is, but they have different views of it. Their disagreements about justice cause them to fight one another. This fighting is destructive. We would be better off if it stopped. We should therefore agree that it is better to settle our arguments peacefully than to insist on getting the right answer. What we need is a decision-maker—*any* decision-maker. The key thing is to have *some* decision-maker, so that the fighting stops, and we can get on with life.

It is appropriate that Waldron begins his book with a quotation from Hobbes, for he shares much with Hobbes. Like Hobbes, Waldron emphasizes the fact of pervasive and durable disagreement within our society.² He stresses that there is no algorithm for finding the right answer to these contested questions. He maintains that these disagreements extend not only to matters of policy or ethics but also to basic questions about political structure and individual rights.³ And Waldron contends that, in light of these disagreements, we need to find a decision-maker.

At just this point, however, Waldron's argument departs from Hobbes's. Waldron does not think that our disagreements should lead us to accept any decision-maker whatsoever. On the contrary, he believes there are reasons to prefer majoritarian legislatures, not only to Hobbesian absolute sovereigns (no surprise there—Hobbesian absolute sovereigns have few fans today!), but also to any system of judicial review.⁴ So the trick to interpreting Waldron's book is to understand how he gets from Hobbesian beginnings to a rather different conclusion.

This much is clear: unlike Hobbes, Waldron believes that political decision-making procedures ought to show equal respect to persons.⁵ That seems plausible enough. The crucial question is this: what is the path that takes us from "equal respect" to "majoritarian legislatures"? Here I want to distinguish two lines of argument from

2. See *id.* at 106 (acknowledging inescapability of disagreement as "the most prominent feature of the politics of modern democracies" and terming it "the circumstances of politics").

3. See *id.* at 106 n.51 ("It is the most prominent feature not just of politics but of our interactions with colleagues when we are debating the issues of rights and justice on which we are all supposed to be experts.").

4. See *id.* at 114 ("The method of majority-decision, by contrast [to the Hobbesian method], involves a commitment to give equal weight to each person's view in the process by which one view is selected as the group's.").

5. See *id.* at 114–15 ("[A]ccording equal weight or equal potential decisiveness to individual votes is a way of respecting persons. In this sense, majority-decision is a respectful procedure—not just an admirable technical device for securing action-in-concert in the circumstances of politics.").

Waldron's book, one of which seems to me mistaken and the second of which is quite powerful and has influenced me tremendously, although no doubt in ways that Waldron will consider perverse.

The first (and, in my view, mistaken) line of argument suggests that the bare fact of disagreement imposes an obligation of neutrality on democratic governments, and that majoritarian voting procedures are desirable because they are neutral in the right way. Waldron's argument emerges most clearly in a passage that responds to Charles Beitz, who believed that inferences from equal respect to majority-decision "reflect an implausibly narrow understanding of the more basic principle [that is, equal respect] from which substantive concerns regarding the content of political outcomes . . . have been excluded (albeit perhaps not in an obvious way)."⁶ To paraphrase Beitz: equal respect is partly a matter of how you are treated, not just what procedures are used to make decisions. Any view that identifies "equal respect" with "majoritarian decision" is unsatisfactory because it leaves out these more substantive concerns.

In response, Waldron contends that even if most people would endorse Beitz's argument, his position is nevertheless "unusable in society's name in the circumstances of politics"—that is, under conditions of disagreement.⁷ Why is Beitz's argument unusable? Because even if we agree that there are substantive concerns related to the idea of equal respect, "[W]e disagree about what counts as a substantively respectful outcome."⁸ And, Waldron continues, "[F]olding substance back into procedure will necessarily privilege one controversial view about what respect entails and accordingly fail to respect the others."⁹ Waldron accordingly concludes that "all one *can* work with is the 'implausibly narrow understanding' of equal respect; and I suspect (though, again, I doubt that one can prove) that majority-decision is the only decision-procedure consistent with equal respect in this necessarily impoverished sense."¹⁰

This argument involves a non sequitur. It is true that any conception of procedural justice will be controversial, and hence will privilege one position over others. But it does not follow that we should embrace majority rule. Far from being neutral among conceptions of "equal respect," majority rule is itself a distinct conception of that ideal. As such, it competes with other interpretations of "equal re-

6. CHARLES BEITZ, *POLITICAL EQUALITY* 64 (1989).

7. WALDRON, *supra* note 1, at 116.

8. *Id.*

9. *Id.*

10. *Id.*

spect.” Thus, endorsing majority rule would not avoid privileging one position over others; on the contrary, doing so would privilege a particular conception that has the unattractive distinction of being rejected by almost everybody.

Indeed, despite Waldron’s emphasis on the fact of disagreement, he underestimates its consequences. In circumstances of deep and durable disagreement, it is a mistake to suppose that unrestricted majority rule, or any other procedure for resolving the disagreement, can count as neutral. Certainly one cannot solve the problem by seizing upon some element (such as “majority rule”) that is common to several positions and then isolating that element from the features (such as, for example, judicially enforced protections for individual rights) that make it meaningful or attractive within those positions.

Later in *Law and Disagreement*, Waldron seems to concede this point. When responding to the arguments of Ronald Dworkin, he admits that “majority rule” is not neutral among competing views of what counts as a democratic decision-procedure.¹¹ Unfortunately, in his response to Dworkin, Waldron abandons neutrality for another, equally unattractive, conclusion. He supposes that if neutrality is impossible, we need not choose among procedures on the basis of their democratic legitimacy. Instead, he says that we are in a “legitimacy-free zone” and must choose among options on the basis of pragmatic considerations about what “we can get away with” under the circumstances.¹²

But why should we accept this depressing diagnosis? The impossibility of neutrality does not mean that there is no best answer to the questions that divide us. It means only that each of us must act on the basis of some controversial understanding about what to do and how to proceed. All of us must argue for one choice or another on the merits, realizing that our recommended position will inevitably be controversial, not neutral.¹³ Disagreement thus rules out the possibility of easy, consensual answers, but it does not give us any reason to abandon our principles.

In my view, then, Waldron cannot successfully defend “majority rule” on the ground that it is neutral among, or abstracts from, competing conceptions of equal respect. There is, however, a second line of argument in his book that is much more powerful. This second argu-

11. *See id.* at 299–300.

12. *Id.* at 300.

13. My point here repeats a theme articulated often and effectively by Dworkin. *See, e.g.,* Ronald M. Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *PHIL. & PUB. AFF.* 87 (1996).

ment does not depend at all on the idea that majority decision is neutral. Instead, it proceeds in two steps, each of which makes substantive, controversial moral claims. The first step maintains that the scope and content of individual rights should be subjects for democratic decision-making. The second step contends that democratic decision-making requires legislative supremacy.

The first step of this argument is crisply embodied in Waldron's statement that democracy entails that "the people are entitled to govern themselves by their own judgments," including judgments with regard to reasonably controverted questions of justice and morality.¹⁴ That is a powerful idea. Indeed, we might go further and say that insofar as we care about the privilege of governing ourselves, we should care most of all that we govern ourselves with regard to questions about justice. If democracy matters to us, in other words, we ought to want self-government with regard to the things that matter, and not just the minor details that do not.

Now, of course, there are some things—such as, for example, jailing innocent people or censoring political speech—that democracies may not justly do, no matter how popular such measures might be. Waldron's argument does not deny the existence of such limits. On the contrary, he recognizes that democracies are obliged to respect certain rights and principles.¹⁵ He points out, however, that there will inevitably be good faith disagreement about *which* rights and principles ought to be respected, and he maintains that such disagreements ought to be resolved democratically.¹⁶

The truth of that claim is by no means obvious. For example, one might believe that (1) courts are non-democratic institutions and (2) courts are the most reliable arbiters of individual rights. If so, one might believe that non-democratic courts ought to rule upon the scope and content of individual rights even at the expense of democracy, since, by hypothesis, democracies are obliged to respect the rights and principles which non-democratic courts can reliably identify.¹⁷ Wal-

14. WALDRON, *supra* note 1, at 264.

15. *See id.* at 282–83 (“[T]here is a natural congruence between rights and democracy. The identification of someone as a right-bearer expresses a measure of confidence in that person’s moral capacities—in particular his capacity to think responsibly about the moral relation between his interests and the interests of others.”).

16. *See id.* at 306–09 (“[A] political culture—such as that which pervades and surrounds the US Supreme Court—may be a culture of rights . . . even though it is at the same time a culture of disagreement . . . and there may be nothing to do about disagreement except count up the ayes and the noes.”).

17. For a view of this kind, see Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998).

dron's claim presupposes either that no non-democratic institutions are epistemically advantaged with respect to the identification of basic principles of justice, or else that, even if such institutions exist, our commitment to democracy is sufficiently powerful to trump whatever benefits we might obtain from these non-democratic, rights-protecting institutions.

Waldron's claim that the people are entitled to govern themselves with regard to matters of justice is thus controversial, but it is also, in my judgment, powerfully attractive. For most of us, our commitment to democracy and self-government runs deep, and only with great regret (if at all) would we admit that the people are incapable of deliberating and deciding about the questions that matter most. Lawyers and political theorists too often defend constitutional limits and judicial review on the basis of the idea that there are moral limits upon what a democratic people may do. That's so, but it begs the question of *who*, other than the people, should decide the content of those limits, given that they are durably contested and that there is no algorithm for producing the right answer. Waldron has highlighted the case in favor of allowing the people to decide these fundamental questions for themselves, and, in doing so, he has made what I regard as a major contribution to constitutional theory.

Yet, that cannot be the end of the story. Waldron's powerful claim is that the people ought to govern themselves on the basis of their own judgments about justice and other things. But "the people" is not the same thing as "the legislature." National legislatures are tiny, elite bodies; there are more than 260 million Americans, but only 535 members of Congress. The vast majority of Americans have no hope of ever mounting a credible congressional campaign. That is why Aristotle, in *Politics*, said that electing officials was an aristocratic form of government; he recognized that only elites would win elections (according to Aristotle, true democracies choose public officials through lotteries that give everybody an equal chance to serve in the government).¹⁸

For the most part, *Law and Disagreement* ignores the elitist features of legislatures. For example, Waldron criticizes judicial review on the ground that it "do[es] not allow a voice and a vote in a final decision-procedure to every citizen of the society."¹⁹ True: it doesn't. But neither do congressional decisions. That is, you and I don't have the right to vote on any of the bills that go through Congress, not

18. ARISTOTLE, *POLITICS*, Book IV, 1294b & Book VI, 1317b (Ernest Barker trans., Oxford Univ. Press 1952) (350 BC).

19. WALDRON, *supra* note 1, at 299.

initially and not *via* referenda afterwards. So what's the preference for legislatures?

That might sound thick-headed. We don't vote *in* the legislature, but we do vote *for* legislators. And so someone might say, look, if the people should govern themselves on the basis of their judgments about justice and other things, then it is sufficient for the legislature to govern because, as Waldron said in his opening remarks today, the legislature is a kind of reflection of the people. Or one might say, less metaphorically, that the legislature is pretty much equivalent to the people, because if legislators are not sensitive to the people's views, then the people can throw the bums out.

We've reached a crucial point in the argument. Here is where I want to lodge my objection related to the institutional complexity of constitutional self-government. My objection will echo some of the things that Professor Sager said earlier this afternoon in his presentation. That is no accident; I have been much influenced by Sager's analysis of what he calls the "strategic space" between political principles and particular legal doctrines or institutions—that is, the pragmatic choices one must make in order to create institutions that effectively implement principles.²⁰ In my view, Waldron underestimates the range of institutions that might plausibly implement the principle he endorses.

Waldron's principle is that the people ought to govern themselves with regard to contested questions of justice. He recommends majoritarian legislatures as the institution best suited to implement this principle, and he recommends them on the ground that legislatures (even though not simply equivalent to the people) will be sensitive to the people's moral judgment, since the people can boot wayward legislators out of office. But that's not precisely right. It's not "the people" but rather "the voters" or "the electorate" who can remove legislators from office. That may seem like an odd distinction—save for certain restrictions on the franchise, are not "the people" and "the electorate" the same thing? Not at all. "Voter" is a political office located within a particular political institution ("voting"). Like any political office or political institution, "voter" has specific characteristics associated with it and these specific characteristics give rise to

20. See, e.g., Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

specific incentives that influence how the office holder exercises the office.²¹

What are the characteristics of “voter,” considered as an office? First, “voters” have severely limited choices. In the last presidential election, your choices were “Bush” or “Gore.” You could vote for “Nader” or “Buchanan,” I suppose, or even write in the name of your best friend—but you had to pick a candidate (you could not write down your preferred positions on key issues). And, if you wanted to pick a candidate who might win, you had only two choices. Second, voters choose anonymously. Nobody monitors the choices made by individual voters. Third, voters are neither required nor even permitted to state reasons for their choice. There is no line on the ballot reading, “State your reasons for preferring Al Gore.” The electoral mechanism does not care what your reasons are. Fourth, in general, voters can be confident—even in Florida in the year 2000—that their own, single vote will not matter to the outcome of the election. It is exceedingly unlikely that an election will be decided by just one vote—and if the election is that close, then, as we saw in Florida, errors in the count are likely to swamp the effect of any single voter’s ballot.

In sum, voters, unlike congressmen or Justices, cast their ballots knowing to a virtually certainty that their vote will have no impact either on the outcome of the election (because the numbers are too high) or on their own reputation (because they do not have to identify whom they voted for, much less give reasons for it). These features of the office of “voter” create particular incentives, and those incentives operate on voters in ways that political scientists have explored in some detail.²² First, people have little incentive to vote. Second, even if people do vote, they have no incentive to do a lot of research about their choices. Third, the system at least permits voters to act on the basis of their personal self-interest, and may actually encourage them to do so. It is common wisdom that “people vote their pocketbooks.” Great campaigners capitalize on this insight. Thus, Bill Clinton reminded himself and his campaign staff never to forget that “It’s the economy, stupid!”²³ Years earlier, Ronald Reagan asked voters, “Are

21. See CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 50–51, 60–62 (2001) (detailing distinctions and dynamics between “the people” and “voter” as political office holder).

22. The seminal work is ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

23. See Ronald Brownstein, *Economic Concerns Fueled Clinton’s Drive to Victory*, L.A. TIMES, Nov. 4, 1992, A1.

you better off now than you were four years ago?"²⁴ That is not the question you would ask an appellate court judge if you were making an argument in court; judges are forbidden to decide cases on the basis of personal self-interest. Nor would it be permissible to ask jurors to decide a case on the basis of their personal self-interest (the individuals who make up juries and electorates are more or less the same, but "juror" and "voter" are different political offices with different responsibilities and incentives attaching to them). But it is generally thought acceptable to "vote one's pocketbook."

The electoral system thus encourages voters to act upon their self-interest and it makes legislators dependent upon these expressions of self-interest. It is not my purpose to disparage either legislatures or majoritarian elections. Self-interested voting is a useful political institution. Democracies ought to make their citizens better off, and elections are valuable partly because they provide useful signals about whether people are happy with their lot. Nevertheless, after one realizes that legislatures are sensitive to the electorate and that the electorate is not simply equivalent to the "people," but rather consists of voters who have (by virtue of their office as "voters") particular incentives, one can ask the question: "Might legislators be—under some circumstances and for some issues—relatively poor representatives of the people?" And, more to the point, one can then ask, "Might we sometimes do better by substituting other representative institutions in place of legislators, at least with regard to some issues?"

In fact, although we Americans commonly think of our government as democratic, we rely on many institutions that are insulated from directed electoral control. For example, we protect the Federal Reserve Board, which makes some of the most important economic decisions in this country, from direct influence by voters. That is not because we want the Federal Reserve Board to ignore the interests of the people, but rather because we think if the Board were directly answerable to electoral procedures (or to ordinary politicians), it might in fact do a worse job, given the disparity between short- and long-term incentives.

In my book *Constitutional Self-Government*, I have suggested that judicial review can be defended in much the same way as the Federal Reserve Board—that is, not as a constraint upon democratic self-government, but as one institution that (together with others, including, importantly, majoritarian legislatures) implements a complex

24. See Adam Clymer, *Poll Shows Iran and Economy Hurt Carter Among Late-Shifting Voters*, N.Y. TIMES, Nov. 16, 1980, at 1.

form of democratic self-government.²⁵ The argument goes as follows: with regard to questions about justice and rights and constitutional essentials, there is a particular reason to worry that legislators sensitive to voters may be unsatisfactory representatives of the people. The people themselves generally distinguish moral issues from issues of self-interest. They recognize that moral issues must be decided on different kinds of grounds; in particular, moral issues must be resolved on the basis of moral arguments rather than personal interests. It is wrong, in other words, for me to test the validity of a moral principle by asking whether adhering to it has made me better off than I was four years ago. Yet, as we have seen, that self-interested question is exactly the sort of question we expect voters to ask themselves. So there is something worrisome about the way that “the voters” (as distinguished from “the people”) are likely to treat moral questions. And consequently there is reason to ask whether our government becomes more representative, and more democratic, if the judgment of legislators is supplemented by the judgment of other institutions less sensitive to electoral pressure.

In my view, American-style judicial review is one good way (though certainly not the only way, and not a perfect way) to increase the capacity of the people to govern themselves with regard to fundamental questions about justice. The utility of judicial review depends on two characteristics of the judicial office, one that is constantly referred to by critics of judicial review and one that (although obvious) seems frequently forgotten. First, federal judges in the United States are not elected and (more importantly) hold their jobs for life. Supreme Court Justices in particular not only have life tenure, but they have life tenure in what is, for most American lawyers, the best job they can imagine. As a result, they have no need to worry about advancing their own personal career. They are therefore capable of making decisions in a disinterested fashion. Judges’ personal interests are not at stake in the way that is true for both legislators, who have to worry about losing their office, or voters, who are invited to vote for whatever candidate will make them better off (in terms of income, career, or what have you).²⁶

Second, although federal judges are not elected, neither are they chosen on the basis of a merit exam administered by highly distinguished law professors (much though some law professors wish that were the procedure!). Instead, they are political appointees, chosen on

25. EISGRUBER, *supra* note 21, 71–74 *passim*.

26. *Id.* at 57–64.

the basis of their political views. Some people think this fact is an outrageous and new feature of the judicial appointments system—they complain about the “politicization” of the appointments process.²⁷ Political scientists and historians, however, have shown that the political character of the appointments process is as old as the Constitution itself.²⁸ In my judgment, it is not merely old but also desirable. It guarantees that federal judges will have a “democratic pedigree.” It ensures, in other words, that judges will not be idiosyncratic political radicals, but rather will express moral judgments more or less consistent with some current of mainstream American political thought.²⁹

My claim, then, is that judicial review is best understood not as a departure from the goal that Waldron rightly identifies (namely, the goal of the people governing themselves with regard to issues of justice), but rather as a way of implementing a sophisticated understanding of what it means for the people to govern themselves. That is why I said, at the beginning of this talk, that Waldron might be disappointed with where his insights have led me. I have drawn two lessons from his book, one positive and one negative. The positive lesson is that it is attractive to suppose that the people should govern themselves with regard to contested questions of justice, and we should look for some way to make that ideal meaningful. The negative lesson is that it cannot be a decisive objection to the democratic legitimacy of judicial review that it “does not allow a voice and a vote *in a final decision procedure* to every citizen of the society.” Were that objection valid, it would also prove that Congress was democratically illegitimate. The case for or against judicial review, and the case for or against legislative supremacy, has to be made on the basis of much more pragmatic judgments about how well each institution represents the people.

Indeed, Waldron’s own enthusiasm for legislatures presupposes some pragmatic argument about why legislatures are more able to represent the people than are plebiscites. Waldron spends much more time comparing legislatures to courts than he does comparing legislatures to plebiscites. That is somewhat surprising, since his insistence upon giving people a “direct voice” in policy debates and his focus

27. See, e.g., STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS*, at x–xi (1994).

28. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 128–31, 153–56, 162–74, and 258–59 (2000); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 85–93 (1999).

29. EISGRUBER, *supra* note 21, at 64–66; Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 WM. & MARY BILL RTS. J. 177, 179–81 (2001).

upon the exclusivity of courts might incline him toward plebiscites—as I have already observed, legislatures, like courts, are exclusive institutions in which most Americans have no chance to serve. Would not plebiscites be more democratic? I assume that Waldron is skeptical about plebiscites because they short-circuit deliberation. Sometimes he makes arguments that tend in that direction—or that, to be more precise, praise the deliberative character of legislatures.³⁰ But if Waldron were to lean heavily on such arguments, he would also have to weigh the institutional failings of legislatures, and he would have to consider whether courts or other institutions might, in some circumstances and for some purposes, represent the people better than would legislatures. That, in my view, is why Waldron occasionally falls back upon the “neutrality” arguments that I criticized earlier. Those arguments (if they were correct) would give Waldron a principled basis for preferring majoritarian elections to judicial review under all circumstances. By contrast, if Waldron were to admit that the extent of legislative authority depended heavily on the pragmatic characteristics of legislative behavior, then, while he might still differ with me about the virtues of judicial review, he would almost certainly have to qualify his endorsement of legislative supremacy.

To be more precise, Waldron would have to admit that some combination of legislative and non-legislative institutions would be more democratic than a purely legislative system. In fact, I think Waldron’s theory would be more powerful, if less pure, were he to take that path. There is much to be said on behalf of legislatures, and Waldron has done a great deal to enhance our appreciation of their constitutional significance—but it seems to me that his claims would be much more convincing if they were more qualified and contingent.³¹

In this connection, I want to summon as witness against Waldron a character whom he himself invokes: Bartolus of Sasseferrato.³² Now, I freely admit that I had never heard of Bartolus before reading Waldron’s book, and, for all I know, Waldron may have invented him.

30. See, e.g., WALDRON, *supra* note 1, 69–72.

31. As Wojciech Sadurski notes, the benefits of judicial review are “contingent on specific institutional comparisons and cannot be [assessed] in abstraction from the particular circumstances in a particular country.” Wojciech Sadurski, *Judicial Review and Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275, 299 (2002). Sadurski’s comment refers specifically to the benefits of judicial review for individual rights; he distinguishes such arguments from other arguments, including Waldron’s, that focus on questions of democratic legitimacy. *Id.* at 280. For reasons given in the text, however, Sadurski’s conclusion may be generalized to encompass questions of democratic legitimacy as well as questions about whether judicial review enhances the protection of individual rights.

32. See WALDRON, *supra* note 1, at 62–66.

Yet, “Bartolus of Sasseferrato” is such a charming and euphonous name that I cannot resist mentioning him. According to Waldron, Bartolus lived back in the fourteenth century—around 1350 or so—when legislatures were novel institutions and legal theorists believed that legislation was an illegitimate form of law. Bartolus traveled around Italy, noticed that legislatures were common, and decided that a good theory of law should accommodate this fact. Waldron praises Bartolus for recognizing that “when legal doctrine appears to contradict stable and well-established facts, it is sometimes the legal doctrine not the facts that ought to be modified.”³³

Yet if Bartolus were to travel about the world today, he would notice that no modern democracy governs itself through a model so purely legislative as what Waldron seems to prefer. Judicial review is spreading like wildfire among the world’s democracies. More generally, there are all sorts of other law-making institutions besides legislatures and courts that people have found useful to self government: administrative agencies, city councils, independent central banks like the Federal Reserve Board and so on.³⁴ Should not we, in the spirit of Bartolus of Sasseferrato, recognize these other institutions as equally legitimate mechanisms for democratic self government? It is hard to believe that the only truly democratic form of government is an archaic version of parliamentary government that almost nobody wants and that may no longer exist anywhere in the world.³⁵

33. *Id.* at 63.

34. City councils are probably too small to count as “legislatures” on Waldron’s criteria; he stipulates that “any legislature worth discussing is a multi-member assembly, comprising hundreds of persons with diverse views.” *Id.* at 142.

35. An Oxford University political scientist, Vernon Bogdanor, writes that for new constitution-makers, the British parliamentary system “has become a warning of what to avoid. In the 1990s, not one of the new democracies of Central and Eastern Europe contemplated adopting the British system.” VERNON BOGDANOR, *POWER AND THE PEOPLE: A GUIDE TO CONSTITUTIONAL REFORM* 11 (1997). In light of the devolution of parliamentary authority to Scotland, the ongoing reform process in Northern Ireland, and, especially, Britain’s participation in the European Union and the European Convention on Human Rights, not even Britain can be said to conform to the pure model of parliamentary supremacy any more. *See, e.g., Britain’s Constitution: The Case for Reform*, *ECONOMIST*, Oct. 14, 1995, at 25, 28 (“EU membership has blown a hole through the middle of Dicey’s theory of parliamentary sovereignty.”).

