

CONSTITUTIONAL JUSTICE

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INTRODUCTION

Jeremy Waldron, in his book, *Law and Disagreement*, champions pure parliamentary democracy against its increasingly prevalent rival, judicially-enforced constitutionalism.¹ Waldron thinks judicially-enforced constitutionalism is at deep conceptual odds with itself, and that the great swing among democratic states towards judicially-enforced constitutional regimes is a fundamental mistake, a mistake that leaves the world much the worse.

Waldron argues that, precisely because we think of ourselves as rights-bearing creatures, we ought to eschew judicial intervention in our political life on behalf of rights.² This apparently paradoxical argument rests on the claim that there are entailments to the belief that we are the sorts of creatures that are entitled to rights, and these entailments are fundamentally inconsistent with judicial deflection of majoritarian political choices.³

Waldron's argument is interesting and ingenious. It is also demonstrably wrong, wrong in the best way: when we understand why Waldron is mistaken, we will also better understand the appeal of judicially-enforced constitutionalism to modern democratic states.

I.

WALDRON'S PRIMARY CLAIMS

We regard ourselves as rights-bearing creatures, and Waldron sees two important propositions as entailed in this important dimension of our self-regard: the first we can call a claim of *epistemic capacity*, and the second we can call a claim of *deliberative entitlement*.

A. *Epistemic Capacity*

The claim of epistemic capacity goes roughly like this: If we think of ourselves as entitled to rights, it follows that we should think

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1. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

2. *Id.* at 221–23, 250.

3. *Id.* at 296–301.

of ourselves as having the capacity to make sound judgments about the rights we have. If we trust ourselves to exercise the discretion to choose among courses of action that rights confer upon us, we ought to, in turn, trust ourselves to reflect upon, debate, and ultimately come to conclusions about what rights we all have.

We can grant Waldron's conclusion that we should regard ourselves as generally possessed of epistemic capacity with regard to rights; after all, who besides us is there? But, in passing, we should note that his particular argument for this capacity is not persuasive. It does not follow from the fact that we regard ourselves as rights-worthy that we should regard ourselves as well-endowed to make judgments about rights. We might be the kinds of creatures that are appropriately seized with rights, especially rights granting us choices about our own lives, and not be especially good at the enterprise of self-guidance—although we might be better than anyone else at that enterprise. And, more to the point, we might be able to make reasonably competent judgments about our own lives, yet do poorly when it comes to the enterprise of charting our collective lives. We might, that is, have good sense with regard to our own projects, but do a bad job of recognizing the claims of others who get in our way.

These difficulties with Waldron's case for epistemic capacity are worth noting, because they help remind us of concerns that will become important further along in the argument, when it comes to applying the premise of epistemic capacity to questions of institutional design, like the choice between legislatures and courts. If, for example, we believe that self-interest may indeed cloud our judgments about the rights that others have, then Waldron's mapping of our commitment to rights onto judgments of epistemic capacity is much too blunt and sweeping, as it ignores the obvious impact of deliberative environments upon our ability to reach sound judgments of many different sorts, including judgments about the rights of others. We will return to this point; for the moment we are getting a little ahead of ourselves.

B. *Deliberative Entitlement*

The second claim that Waldron seeks to derive from the basic fact that we are rights-bearing creatures is a claim of moral entitlement. Part of the conceptual logic of rights on this account dictates not only that they be *offered* on equal terms but that they be *deliberated* on equal terms. As rights-bearers, insists Waldron, we are all entitled to participate in the process of rights contestation on equal

terms.⁴ As to this second entailment of rights, I emphatically concur. In the process of contestation of rights, we are indeed entitled to be treated as equal members of our political community, and that proposition does seem intrinsic or at least closely connected to the logic of rights.

Let us call these two claims—that we are creatures seized with the capacity to make judgments about rights, and that we are entitled to participate in the process of deliberating about rights on equal terms—Waldron’s *primary* arguments. We need a vocabulary of this sort because neither of these claims lends direct support to Waldron’s assault on judicially-enforced constitutionalism. In each case, Waldron needs to turn to a secondary proposition to find support for his ultimate position. And the secondary claims, as we shall see, are where the real difficulty with Waldron’s position lies.

II.

WHERE THE WILD THINGS ARE: WALDRON’S SECONDARY CLAIMS

From his claim of epistemic capacity, Waldron finds assurance that reasonably well-formed democratic legislatures are trustworthy venues for the contestation of rights, and that we should feel no need to invoke other institutional arrangements, like courts, to improve the outcomes of legislative choice.⁵ And from his claim of deliberative entitlement, Waldron concludes that political justice requires parliamentary supremacy and hence bars the intervention of a constitutional judiciary in parliamentary outcomes.

Now I think that neither of these secondary claims follows from Waldron’s primary claims, and further, that neither of these secondary claims is correct—even on the hypothesis that the primary claims are correct. These remarks are organized around the project of demonstrating that each of Waldron’s secondary propositions is wrong.

A. *Institutional Capacity*

Consider the connection between epistemic capacity and the thought that we have no rights-seeking reason to supplement legislative outcomes with judicial oversight. We need at the outset to disabuse ourselves of the picture that seems to lie behind Waldron’s argument here, in which the legislature is *us*, and the constitutional judiciary is *them*—an external mechanism intervening in our affairs.

4. *Id.* at 232–36.

5. *Id.* at 214.

The constitutional judiciary, of course, is populated by people just like us—rights-holders, the epistemically-endowed. The question has to be under what sorts of circumstances epistemically well-endowed creatures like us are able to do better or worse in the enterprise of making judgments about what rights we should all have. It's not us versus some alien force; it's us in a variety of political and institutional contexts, none of which—on any pertinent axis—is complete or perfect. This much is clear: in debates about fundamental questions of constitutional structure, we are choosing among highly fallible institutional arrangements and looking for those arrangements that have more promise than others. Direct democracy, were it feasible, would comprise one family of contenders; representative parliaments with supreme authority, a second family of contenders; and governments that include a constitutional judiciary with the authority and responsibility of constitutional oversight, a third.

So the question for our present purposes is: which of these arrangements is more epistemically promising? There are structural features of a constitutional judiciary that make it a promising environment for the contestation of rights. An appreciation of those features has led an extraordinary number of modern democratic states to adopt written constitutions and empower some judicial entity or entities to enforce those constitutions. Waldron cannot waive aside the epistemic claims on behalf of the judicial enforcement of basic rights on the simple grounds that those rights presuppose the judgmental capacity of our species, full stop.

There are at least three qualities of constitutional courts and judges that hold distinct epistemic promise. First, constitutional judges are, in at least two senses, impartial. In most modern constitutional regimes, high court judges are not elected and hence are not vicariously attached to the immediate interests—personal or political—of members of their political community.⁶ Moreover (and we will take this up shortly as a matter of independent importance), judges are obliged by the protocols of adjudication to attend to comparatively general and comparatively durable principles, principles that apply to a variety of different circumstances. As a result, judges are affected in a variety of conflicting and diffuse ways by the cases before them. Judges are constrained to abide by principles that, by their temporal, geographic, or substantive reach, sprawl across areas of disinterest and interest on the judges' part. Were they otherwise inclined to choose principles that cut narrowly in favor of things they

6. *Id.* at 185.

care about today, they would have to appreciate that those same principles could work powerfully against them tomorrow.

Think, for example, of a judge who is faced with the question of the right of the Ku Klux Klan to burn a cross in a public demonstration. Her ruling on the case will have powerful repercussions in other, easily imaginable cases where she will be much more sympathetic with the would-be demonstrators. So judges are detached twice over—they are detached from the vicarious interests of the members of their political community by the absence of their ongoing political accountability and even from their own immediate interests and projects by the demands of their adjudicatory role.

Second, constitutional judges pursue a function that is specialized and redundant. With apologies for the banality of the metaphor, they are like quality-control inspectors in, say, an automobile plant. The job of producing a successful car, after all, is complicated. It certainly includes concerns about the quality of the ultimate product, but it also includes potentially competing concerns, like getting cars out fast and cheaply and producing cars that are attractive. But the quality-control inspector has only the job of assuring that the cars which leave her plant are well-built. Her role is focused and singular and comes on top of the efforts of the people who actually put the cars together. Constitutional judges are like that. Their mission is singular—to identify the fundamentals of political justice that are prominent and enduring in their constitutional regime and to measure legislation or other governmental acts by those standards. And their mission is redundant—they enter the process only after legislators have themselves considered the constitutional ramifications of proposals before them. Constitutional judges are emphatically not a natural or constructed elite, endowed with unquestionable expertise. But their role—their function—may well give them a distinct epistemic advantage.

And third, constitutional judges, as an aspect of the practice of common law adjudication, engage in what some philosophers describe as reflective equilibration. A thoughtful judge has to move back and forth between general propositions and specific cases, with the goal of finding those general propositions that seem satisfactory as the basis for their decisions over the run of cases. Judges have to settle on propositions that both account reasonably for past decisions and chart an attractive course for future decisions. This, broadly speaking, is *stare decisis* doing its job. There are important virtues of this mode of analysis. As we have observed above, the obligation of generality imposed by these adjudicatory constraints serves to create a kind of functional impartiality among judges. Moreover, reflective equilibration is

regarded by many moral and political theorists as a natural and effective means of normative reflection, or alternatively, as a means to check or discipline normative reflection. Law students are familiar with this process, which often goes something like this:

Professor offers hypothetical, asks how the case—involving, say, landmark preservation restraints on a landowner—should be decided and why. Student replies, offering in part a general principle, like “Whenever the government causes a landowner to suffer a diminution in the value of her land, the government should be obliged to compensate the owner.” Professor offers an instance where the student’s principle is likely to produce what the student will regard as undesirable results: “Suppose the government builds a new highway, which has the effect of enticing traffic away from the little town where the owner owns a gas station, and the owner loses a lot of income and suffers a diminution in the value of his land?” Student replies, offering a better-shaped principle, possibly even changing her mind about the appropriate outcome in the original hypothetical.

And so on.

There is as well a deeper reason for favoring the common law model of adjudication as a means of deliberating about rights. Much modern thinking about political morality—often described as *contractualist* thought—has in common the idea that our political arrangements must in principle be justifiable from the perspective of each member of the political community.⁷ And, more broadly, it is an intrinsic aspect of the substantive logic of rights that they be available to everyone who falls within their substantive reach; in this sense, the notion of *equal rights* is redundant. *Generalization* is thus at the substantive heart of sound deliberation about rights. The institutionalized process of reflective equilibration, towards which common law adjudication aims, mirrors this demand for generalization.

B. Electoral and Adjudicatory Equality

Waldron’s other crucial secondary claim is attached to the proposition that we are entitled not only to enjoy rights on equal terms but to participate in the contestation of rights on equal terms.⁸ His claim here is that it follows from the right of deliberative equality that members of a just political community are entitled to an elected legislature

7. See, e.g., Robert Post, *Theories of Constitutional Interpretation*, in *LAW AND THE ORDER OF CULTURE* 21 (Robert Post ed. 1991) (“If doctrinal interpretation rests on the equation of constitutional authority with law, what I shall call ‘historical interpretation’ rests instead on the equation of constitutional authority with consent.”).

8. WALDRON, *supra* note 1, at 223.

that has final authority over the content of contested rights. In thinking about this claim, it is important to consider two very different ways in which people can participate as equals in the process of deliberating about rights.

One way in which a member of a political community can participate as an equal in the process of resolving disputes over what rights members of that community have is by being equally entitled to vote for political representatives, who will in turn make decisions about rights. This is certainly not an unimportant way to participate in rights contestation, but it is in some respects a thin way and a dangerous way. It is thin and dangerous because elected political representatives are inevitably drawn in some not insubstantial degree to respond to the power of votes or of dollars as opposed to the force of an individual's or group's claim that they have right on their side. To be sure, the competition among electoral contenders for support will often push the powerful to include the interests of the less powerful in their political agendas. Driven in part by their location at the margins of power, "discrete and insular minorities" may through coordination of their determined energy acquire substantial political muscle. But this is a function of what is expedient in shifting political circumstances, of the wavering hand of a process that is not accidental, but which proceeds far more readily by the logic of accumulated power than by that of reflective justice. No one can demand to be heard or to have their interests taken into account unless they can make themselves strategically valuable. In the real world of popular politics, power, not truth, speaks to power.

The second way that a member of a political community can participate as an equal in the process of rights deliberation is to have her rights and interests—as an equal member of the political community and as an equal rights holder—considered and taken account of by those in deliberative authority. Any member of the community is entitled, on this account, to have each deliberator assess her claims on its merits, notwithstanding the number of votes that stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in the community. Implicit in this form of equal participation is the right to be heard and to be responded to in terms that locate each person's claim of rights against the backdrop of the community's broad commitment to and understanding of the rights that all members have.

Legislatures, obviously, are preferred venues for the first mode—the electoral mode—of participating as equals in the process of choosing among conflicting views of what rights we should all have. Less

obviously, perhaps, courts are preferred venues for the second mode—we might in fact call it the adjudicatory mode—of participating in that process. Any person injured in the right sort of way is entitled to be heard by courts, entitled to present her claims and the arguments on their behalf, and, at worst, entitled to a reasoned statement of why her claims were not deemed by a majority of the judges to be persuasive. Judges may well be flawed deliberators, of course, and the very independence that makes them impartial also makes them relatively impervious to electoral correction. But when a constitutional protagonist turns to the courts, she can be anyone; she can represent a minority of one or be a member of a group that is widely ridiculed or deplored. Much of what is good in constitutional law, in fact, has been provoked by the claims of such groups. What matters is the strength of her argument in the eyes of the judges, and, failing her success, she is entitled to an explanation of why her claim was found wanting.

Many contemporary democratic theorists argue for a political process that combines both electoral and adjudicatory equality in the process of rights contestation. Frequently proceeding under the banner of “deliberative democracy,” these theorists sometimes conjure an idealized legislative process in which elected representatives in effect hear and resolve the conflicting claims and competing interests of all the individuals in the community, are conscientious and articulate in their adjudication of those claims, and cast their votes on the proposals before them in accord with their best understanding of what each claimant is owed. As a purely theoretical matter, there is some question as to whether a single representative or body of representatives can simultaneously do justice to the demands of both electoral and adjudicatory equality. But setting that interesting question aside for another day, it plainly is the case that modern legislatures are structured to respond to electoral rather than adjudicatory responsibility, and that the deliberative legislative assembly is a conceptual goal rather than a practical reality.

Most modern democratic states now have a portfolio of institutional arrangements, however, a portfolio in which legislatures offer the promise of electoral equality and constitutional courts offer the promise of adjudicatory equality. No governmental arrangements are anything near perfect, of course, and we can no doubt find much to criticize and much to improve upon in both contemporary legislatures and contemporary constitutional courts. And it is too early in modern democratic history to say that a political community that includes judicially-enforced constitutionalism in its portfolio of governing mechanisms is inherently better off for having done so. But it is surely a

mistake to conclude that a society that maintains a pure system of legislative supremacy better respects its citizens as rights-holders and political equals than one which makes rights the center of a judicially-enforced constitutional practice. The logic and practice of constitutional adjudication offers its own distinct—and distinctly valuable—form of equality.

