What Makes a Political Theory *Political*?
A Comment on Waldron

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Abstract: This essay considers Jeremy Waldron's recent contribution to a growing conversation about how to make political theory and philosophy more responsive to real politics—*Political Political Theory* (2016)—in light of his broader body of work, especially *Law and Disagreement* (1999). I argue that rather than providing a genuine alternative to the idealization and abstraction characteristic of what Waldron labels the "justice industry," he uses the concept of what counts as properly "political" to grant nearly absolute priority to a certain class of concerns over others. This strategy places him in the company of a long line of liberal theorists, but it does not necessarily make his theory more *political* than its rivals. His alternative simply focuses its idealization and abstraction on the ideal of legitimacy rather than justice.

Keywords: realism, legitimacy, justice, Jeremy Waldron

Political Political Theory: Essays on Institutions (2016) is a collection of Jeremy Waldron's recent essays, held together by an eponymous introductory chapter which advocates a particularly *political* variety of political theory. Its guiding mission, he says in the preface, is to "encourage young political theorists to understand that there is life beyond Rawls, life beyond the abstract understandings of liberty, justice, and egalitarianism" (ix). He accepts the importance of questions such as "what is justice?" and "what are the ends of life?", but argues that in recent years, political theorists and philosophers have focused on them to the exclusion of equally important *institutional* questions. Like many others who have come to be called "realists" or "nonideal theorists," in other words, Waldron criticizes the post-Rawlsian "justice industry" (3) for its excessive idealism and abstraction from real politics; and indeed, Waldron explicitly allies himself with these scholars (5). Even if political theorists retain a focus on justice, he says, they must "complement that work with an understanding of the mechanisms through which these ideals—these ends of life—will be pursued" (6).

The title essay is followed by chapters reflecting on the virtues and vices of various democratic principles and mechanisms, including the separation of powers, bicameralism, constitutionalism, judicial review, loyal opposition, representation, and accountability. He closes with two chapters devoted to canonical 20th century thinkers—Isaiah Berlin and Hannah Arendt—who Waldron interprets as representative of an unjustified disdain and a proper esteem, respectively, for the sort of "constitutional politics" he favors. Each of these chapters offers compelling reflections on the particular institutions it considers, amply demonstrating the potential payoff of heeding the title essay's stirring injunctions in favor of institutional analysis.

As this review of topics suggests, however, his vision of the mechanisms and institutions which count as *political* is quite limited, for while he speaks rapturously about *Robert's Rules of Order*

(14) and the "housing" (13) of political action more generally, he has little to say about its content. Moreover, it is the philosophical "foundations" (6) of these institutions, considered in themselves, which are his primary concern, rather than dilemmas we might face in implementing them in an imperfect world. Perhaps most tellingly, he writes, "detailed work on the justification and the normative dimensions of democratic institutions occupies a large part of the space that I have in mind when I talk about *political* political theory" (18), citing the work of David Estlund, Tom Christiano, and Charles Beitz as exemplars.

Whatever its independent value, this research agenda—which Waldron understands as "contestation about the true nature of democracy" (18)—is an odd fit with a "realist" project aimed explicitly at real politics rather than philosophical abstraction; and these authors are particularly odd candidates to serve as its standard-bearers. David Estlund, in fact, is perhaps the most outspoken *critic* of that project, dedicating an entire book to debunking it as "utopophobia" (Forthcoming, 2014). Waldron himself once penned an essay criticizing any approach to political theory which is focused on "political advocacy" (1996: 143) or "policy proposals" (170), claiming that "we are not really doing political philosophy" unless "we are largely at a loss" as to how to answer questions such as "what is the point of your work, what difference is it going to make?" (171). Clearly, Waldron means something quite different when he speaks of making political theory more political.

Realists and others who criticize the "justice industry" for its ignorance of and uselessness to real politics typically seek to analyze the most pressing issues facing political actors, turning their attention to power relations and the means available for contesting them (Bagg, 2015; Levy, 2015; Maloy, 2013; McCormick, 2011; Medearis, 2015; Stears, 2010; Stout, 2012; Woodly, 2015). They articulate social and political imperatives such as basic income guarantees (Ferguson, 2015),

natural resource governance (Wenar, 2016), and racial integration (Anderson, 2010), which seem to be the best response to challenging non-ideal circumstances, all things considered. Here and elsewhere, on the other hand, Waldron uses the term "political" to *exclude* certain concerns from consideration, granting "procedural" requirements overwhelming if not absolute priority when they conflict with supposedly "substantive" claims. Rather than rejecting what Bernard Williams (2005: 8) has called "the priority of the moral over the political" or what Raymond Geuss (2008: 9) has labeled an "ethics-first" approach to political philosophy, therefore, he simply reformulates it. Rather than replacing theories of ideal justice with attention to real politics under nonideal circumstances, in other words, his alternative is a theory of ideal *legitimacy*, whose pre-conditions are no more realistic than those of Rawls' ideal justice. Unlike Rawls, however, Waldron supposes that his theory has direct implications in the real world, leaving no space for non-ideal theory to mediate between the two. If anything, this makes it even *less* political.

Judicial review and the circumstances of politics

The direct political implication which Waldron has most persistently and controversially pressed over the years, of course, is his opposition to judicial review. Countries which have a choice about whether to institute such practices should choose against it, he has argued, and in countries which have already adopted the practice, judges who have a choice about whether to strike down legislation should generally refrain from doing so. This is a major theme of his work, from *Law and Disagreement* (1999, henceforth LD) to the present volume (i.e., *Political Political Theory,* henceforth PPT), which features his most-cited article, "The Core of the Case against Judicial Review," as chapter nine. This volume also presents arguments against the practice in chapter two ("Constitutionalism: A Skeptical View," especially p. 41-43) and in passing throughout (p. 12, 18, 86, 125, 135). It is not my purpose here to contest this particular stance—

with which I am largely sympathetic—rather, the point is to examine his justification for it, and specifically, to understand the role served within this justification by the invocation of what counts as properly "political."

Waldron's basic argument against judicial review is that overruling the decisions of a majority is anti-democratic. For many of its advocates, of course, judicial review is necessary to *protect* democracy; and in particular, to protect those basic democratic rights—such as freedom of speech—without which majority rule itself is not necessarily valuable. But who decides what these are, and when they are endangered? For Waldron, the only plausible answer is the majority itself. Assuming that everyone is committed to the existence of rights on some level, the only neutral way to make decisions about how to interpret and implement those rights is to hold a majority vote—to guarantee a right to participate. As a result, participation emerges as the "right of rights" (LD 232). If a majority votes for a law that restricts speech in a particular way, Waldron contends, so be it: they clearly do *not* believe that the law violates the fundamental right to freedom of speech. Supreme Court justices who claim that it does—as in the infamous *Citizens United* case, perhaps—simply beg the question against the majority. Why should they get to tell the majority how to understand their own rights?

Judicial review, on this account, is not only anti-democratic but anti-*political*, imposing a particular theory of justice or rights upon people who disagree. As he argues forcefully in *Law and Disagreement*, "our common basis for action in matters of justice has to be forged in the heat of our disagreements, not predicated on the assumption of a cool consensus that exists only as an ideal" (LD 106)—a theme which recurs often in the present volume (PPT). In the title essay, for instance, he notes that it is "exactly because we disagree in our ethical and political aims" that we need to care about the "structures that are to house and refine our disputes and the processes that

are to regulate the way we resolve them" (PPT 5), comparing those who allow themselves to "see through" such structures to Julius Caesar (PPT 15). Chapter five concludes with the observation that "even if the objective truth about justice or the common good is singular, here on earth, there are still many of us with many views, and ways must be found to accommodate us all in a political system" (PPT 124). While Rawls and others correctly understood that there are "burdens of judgment" in political life, meaning that "reasonable" people will disagree about issues such as "religion, ethics, and comprehensive conceptions of the good," he argues that they erred in assuming agreement about issues of "justice and social policy" (PPT 94)—i.e., an extensive political framework within which those other disagreements can be safely carried on. In chapter seven, Waldron claims that the "inevitability of disagreement" about such issues "leads to the question: 'Are there any principles of legislation which can be shared by the adherents of rival theories of justice or among rival agendas for public policy?'" (PPT 147). His answer, of course, is yes, and the "most important" of these is majority decision (PPT 164).

While the disagreement he assumes is broader than that assumed by some of his rivals, therefore, it cannot extend indefinitely. There must be some basis for agreement about the principles of legislation he articulates, despite disagreements about "theories of justice" and "agendas for public policy." First, he says, "sometimes we need law in an area even though we have been unable to resolve disagreement about what that law should be; in these circumstances, we need a decision procedure that will involve a mode of participation like voting and a decision rule such as the rule of majority decision" (PPT 164). It is this self-evident or universally acknowledged *need,* then, which generates the justification for majority rule, which emerges as the only procedure which is "neutral between outcomes" and gives "equal weight to each participant's input" (PPT 164). Disagreement, in other words, does *not* extend to the question of

whether all people deserve to participate, or whether majority rule is the fairest procedure for resolving conflicts. In his case against judicial review, accordingly, Waldron limits his scope to "reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members disagree about rights" (PPT 244). On Waldron's view, it seems, a theory is properly political if it responds to a particular set of *circumstances*, characterized by deep but not limitless disagreement.

Waldron is most explicit about these circumstances in *Law and Disagreement,* where he articulates a fundamental distinction between "two tasks in political philosophy" (LD 1-4): theorizing about justice and theorizing about politics. Where the former offers "theories of justice" in response to something like Rawls' "circumstances of justice"—in which disagreement about the proper system of justice is structured by *agreement* about the most basic rights we have—the latter offers "theories of legitimate authority" in response to situations characterized by more *pervasive* disagreement, which he labels the "circumstances of politics" (LD 101). Principles of justice, in other words, are those which tell us how to interpret the rights we all agree that we have, while principles of authority or legitimacy are those which tell us how to decide between competing principles of justice. Theories of justice or rights can therefore be understood as "advice offered to whomever has been identified (by the theory of authority) as the person to take the decision or as one of the persons who is to provide an input into the public choice mechanisms that will yield a collective decision" (LD 244). Since principles of justice speak to substantive political issues, of course, including issues of rights like the freedom of speech, they are necessary for use in political discourse. Given that we disagree about which to adopt, however, we must defer to principles of legitimate authority whenever the two kinds of principles seem to conflict—and it is this deference which is inconsistent with judicial review.

The ambiguous role of "politics"

The idea of the "circumstances of politics" thus serves two functions for Waldron. First, it names a set of hypothetical, idealized conditions, under which unconditional deference to the decisions of a majority is maximally plausible; and second, it is taken to describe the actual situation of "reasonably democratic societies" such as our own. These functions, however, are incompatible. The success of his argument therefore depends upon ambiguity between these two conceptions of what counts as properly "political."

The first task of the circumstances of politics is to make majoritarian proceduralism seem maximally plausible, and to this end, a good deal of specificity is required. In *Law and Disagreement*, for example, he compares the circumstances of politics to a "partial coordination" game in which all players desire *some* solution but disagree about *which* solution is best (LD 103-105). If players must "move" simultaneously, as the conditions of the game suggest, they will have difficulty choosing a solution even though doing so will make everyone better off. It therefore benefits all players, in absolute terms, to agree upon an authoritative decision-making procedure which all will follow, even if it means that some benefit less than others in relative terms. In the present volume, Waldron is less technical about the nature of the "political" circumstances to which majoritarian proceduralism is the best response, but the logic is very similar throughout: majority decision is framed as the fairest response to a universally acknowledged "need" for law under circumstances of relative equality and some level of basic agreement about rights. And indeed, given such circumstances, it is difficult to imagine a better procedure. In their first task, in other words, the circumstances of politics perform well.

Waldron does not just recommend a hypothetical majority decision procedure as the appropriate solution for people facing hypothetical partial coordination games, however, and he does not just argue against judicial review in hypothetical societies of equals. He claims, rather,

that the "circumstances of politics" characterize many actual democracies well enough that citizens in those countries should defer unconditionally to the actual majority decision procedures by which legislation is enacted there. This, of course, is the second task of the "circumstances of politics," and here, he is less convincing.

Consider, first, the analogy of a partial coordination game, in which relatively equally situated participants agree that "we need law in an area" (PPT 164), but cannot coordinate on a particular law unless they first settle on an authoritative decision-procedure. There are a number of problems with this analogy, not least of which is that in most real political situations, many people will be satisfied with the status quo, and will therefore prefer *no* law or state action of any kind. What counts as a partial coordination game, in other words—and therefore as a "political circumstance"—will itself be contested. Take the issues of abortion and climate change. Some people see no "need" whatsoever for laws restricting medical care of women's bodies—no problem whose solution requires coordination—while others see the "genocide of the unborn" as among the greatest threats the world has faced. Conversely, some see climate change as requiring massive coordinated legal action, while for others, the status quo is in no need of reform.

Even if we drop the technical notion of a partial coordination game, these and other examples undermine Waldron's assumption of basic agreement. Perhaps everyone agrees that all persons have a right to life, but do sentient animals or unborn fetuses count as persons? Perhaps everyone agrees that chattel slavery is inconsistent with basic respect for persons, but what about wage slavery, or mass incarceration, or felon disenfranchisement? Moreover, given the presence of majority cycling and agenda control, no voting procedure can be "neutral" towards outcomes (Riker, 1982)—not to mention the countless other ways in which real majoritarian institutions fail to give equal weight to the views of all participants (Gilens and Page, 2014). To reflect Waldron's

perennial question back to him: *who is to decide* whether a particular disagreement about such matters properly concerns procedural legitimacy or substantive justice; the rights we have or the interpretation of those rights? And what is to be done if it turns out that the conditions underwriting the fairness of majoritarian procedures fail to obtain?

Waldron derives majoritarian proceduralism in *real* politics from his reasoning about what is appropriate in *idealized* "circumstances of politics," but this inference is invalid. It may be true that following ideally neutral and fair majoritarian procedures is the most natural way to proceed in hypothetical cases of disagreement between respectful equals about the solution to mutually acknowledged problems. But actors in real political situations must make choices in situations that do not satisfy these conditions, facing disagreement even deeper than that which Waldron is willing to admit, as well as decidedly imperfect institutions of "majority rule." The question they face, in other words, is not "should I obey a law made in a perfectly neutral, fair, procedure, by a majority of equally placed, respectful citizens?" but "how should I act within my unjust society to make it better?"

In many cases, of course—perhaps the vast majority in contemporary liberal democracies—Waldron's practical conclusion stands: the best political action, on balance, is to respect the decisions of highly imperfect majoritarian procedures. But there are exceptions, and in order to make a judgment about what these are, we must be able to *balance* the demands of majoritarian procedures—and the participatory rights of citizens whose commitment to basic rights is questionable at best—against the pursuit of goals which Waldron classifies as "substantive" and therefore secondary. Yet it is precisely its *unconditional* deference to majority rule which differentiates Waldron's view from its rivals. Many others defend majority rule, of course, while allowing for counter-majoritarian action in exceptional cases—of which judicial review is only

one variety. Waldron is relatively unique only in denying that such action is *ever* justified, at least within "reasonably democratic societies." Rather than weighing reasons of procedural legitimacy against reasons of substantive justice, he prohibits this sort of balancing act altogether, granting procedural requirements categorical priority over substantive claims. More specifically, Waldron frames the right to participate—the "right of rights"—as a response to the circumstances of *politics*, which are prior to the circumstances of justice.

Conclusion: Realism against legitimacy?

The reasons for contemporary realists' frustration with the "ideal theory" and "moralism" most often associated with a Rawlsian approach to political theory are admittedly quite diverse (Baderin, 2014; Bagg, 2016; Galston, 2010). A central theme, however, is that the connection between its abstract philosophical reflection and the political choices we face is rather tenuous. In *Political Political Theory*, Waldron aims to demonstrate an alternative mode of theorizing, which yields concrete recommendations about the sorts of political institutions and procedures we should adopt. His alternative, however, simply replicates the problems that realists have sought to avoid, for his "circumstances of politics" are no less "idealized" than Rawls' circumstances of justice. The function of the term "political" here, instead, is simply to exclude certain concerns from consideration. Clearly, concerns about justice are also political in a broad, pre-theoretical sense, as are concerns about the final ends of life, substantive policy outcomes, and so on; Waldron's argument, however, defines the "circumstances of politics" such that all those concerns take a back seat, categorically, to the *truly* political requirement of procedural legitimacy.

He is far from alone in adopting this strategy, which is actually quite common in the liberal tradition. Robert Nozick adopts a characteristically libertarian version of it, for example, claiming that "political philosophy is concerned only with certain ways that persons may not use others;

primarily, physically aggressing against them" (1974: 32). He does not thereby deny the harmful potential of other forms of power; he simply denies that they are properly "political." On the other side of the liberal spectrum, John Rawls' (1993) idea of "political justice" functions in a similar way, relegating concerns which cannot be articulated in the terms of public reason to the private realm, and thereby excluding them from *political* consideration.

In practice, of course, some priorities and exclusions are unavoidable, and many are even desirable—including, in the right circumstances, those advocated by Nozick, Rawls, and Waldron. Physical coercion *is* especially dangerous, and standards for public justification *are* both necessary and important. Most significantly for our purposes, democracy *does* depend on a general willingness among democratic citizens, as well as judges and other government officials, to bracket their substantive concerns and accept the results of majority decisions with which they disagree. There is no need, however, for the priority granted to any of these supposedly "political" concerns to be categorical or absolute. When navigating real political circumstances, we must be prepared to grapple with diverse forms of power, balancing the various demands of justice, legitimacy, the good, and whatever else might become relevant. A properly political theory, I submit, will facilitate this sort of judgment, rather than foreclosing it in service of principled distinctions derived from idealized circumstances of any kind.

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