WALDRON ON CHARTERS OF RIGHTS: THE SCALES OF RESPECT

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Abstract

Jeremy Waldron condemns constitutional arrangements which attempt to incorporate democratic decision making together with a Charter of Rights and the attendant practice of judicial review. By playing on the fact of ubiquitous political disagreement among the members of any polity, and by drawing upon a liberal value-set, Waldron asserts that the constitutional privileging of particular moral principles contained within a Charter of Rights must be seen to impinge upon the political respect which democratic decision-making conveys unto each member of a given polity. On this basis he contends that such mixed constitutional arrangements ought to be abandoned in favor of the purely democratic. The goal of this thesis is to determine the soundness of this argument. Because it is evident that Waldron's critique would be successful given the conventional understanding of the nature and role of Charters of Rights, his argument is tested against a new conception of such constitutional mechanisms put forward by Wilfrid Waluchow. Although it is contended that Waluchow's position does not succeed in evading Waldron's claims concerning the democratic disrespect inherent in the adoption of a Charter of Rights, the nature of the investigation reveals the possibility of other manners in which such a constitutional mechanism *does* respect the citizenry of a state. On this basis it is contended that Waldron's arguments are invalid. More specifically, it is argued that it does not necessarily follow from the fact that Charters of Rights are in tension with pure democratic decision-making that they ought to be regarded as constitutionally undesirable.

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Introduction

Carl Schmitt once claimed that the political developments of the nineteenth century could best be summed up in a single phrase: "the triumphal march of democracy."[1] If the nineteenth century was the time of democracy, then the twentieth, and what we have seen so far of the twenty-first century has borne witness to what may be the beginning of the triumphal march of Charters of Rights and the attendant practice of judicial review. In the last hundred years the ranks of those nations boasting constitutional commitments to fundamental moral rights has swelled. Canada, Israel, Australia, Ireland, Germany, Japan, and South Africa, are only some of the multitude of states which have adopted such legal mechanisms. Moreover, with the ratification of the United Nations Declaration of Universal Human Rights, and the European Convention on Human Rights, this phenomenon has breached the walls of international politics. With the growing introduction of Charters of Rights and judicial review into modern political systems, more and more legal and political commentators have tussled with each other in attempts to appreciate the theoretical implications of what by all appearances, is an ascending institutional juggernaut.[2]

Given that, historically, Charters seem to have ridden in on the tailcoats of majoritarian self-government, perhaps the most interesting question being posed by

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[1] Carl Schmitt, *The Crisis of Parliamentary Democracy.* Cambridge, Mass.: MIT Press, 1985 at 23.

[2] This being said, Bruce Ackerman points out that it is still an open question as to whether we are "at the giddy top of a bull market or on the brink of world-wide hegemony?" in "The Rise of World Constitutionalism." 83 *University of Virginia Law Review* (1997): 771-797 at 772.

contemporary theorists is to ask whether the adoption of such constitutional mechanisms stands theoretically opposed to the rule of the people.[3] In other words, is the constitutional inclusion of a Charter of Rights and the attendant practice of judicial review amenable with a commitment to democratic government, or are these two institutional arrangements conceptually incongruous with one another? It is this question that sits at the heart of an ongoing debate concerning the acceptability of constitutionally entrenching moral rights.

Those who advocate the adoption of Charters almost inevitably claim that these constitutional mechanisms are commensurable with modern majoritarian commitments.[4] However, there is a vocal and, to many, a very persuasive group of Charter critics who adamantly assert otherwise. Preeminent among this second group of theorists is Jeremy Waldron, whose work is generally considered to "represent the most serious challenge to the intelligibility and desirability of Charter review existing in the literature."[5] Waldron claims that the political circumstances and values that legitimate democratic self-rule are incompatible with those that would provide for the imposition of constitutionally entrenched rights of political morality. The point of this thesis is to determine the efficacy of Waldron's critique of the constitutional inclusion of Charters of Rights.

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[3] Hereinafter the term "Charters" will be used interchangeably with "Charters of Rights". These terms should also be understood to include documents such as the American Bill of Rights and any other set of constitutionally entrenched set of moral rights.

[4] It is worth noting that not *all* Charter advocates argue on the basis of the commensurability of these two institutions. For instance, Larry Alexander claims that in order to justify Charters "We need not attempt the impossible task of fitting the square peg of judicial review in the round hole of democracy." in "Is Judicial Review Democratic? A Comment on Harel" 22:3-4 *Law and Philosophy* (2003): 277-283 at 283.

[5] Wilfrid Waluchow. *A Common Law Theory of Constitutional Review: The Living Tree.* Cambridge University Press, 2006 at 215-216. Hereinafter *CLT.*

Given the widespread endorsement of Charters by many of the world's leading political theorists and the ease with which modern democracies have seemingly incorporated moral rights and the power of judicial review into their constitutions, the first chapter of this thesis will explain why this debate is pressing. In order to accomplish this task, Waldron's most important contribution to modern political philosophy will be explored. The chapter will demonstrate that by playing upon a too often overlooked feature of modern politics, that is, ubiquitous political disagreement, Waldron has been able to simultaneously call into question much of the scholarly work supporting Charters, while placing his own position on the cutting edge of the debate.

The second chapter of this thesis will take a closer look at the specific arguments that Waldron launches against Charters, and will examine what he finds to be so important in the idea of majoritarian self-government. On the basis of Waldron's positions, this chapter will investigate a potential weakness in his argumentative strategy, in order to ascertain whether it might represent a point of frailty in his critique of Charters.

Chapter three turns to an investigation of whether the weakness in Waldron's argumentative strategy can be exploited sufficiently to undermine his rejection of Charters and judicial review. Because it is evident that Waldron's critique would be successful, given the conventional understanding of the nature and role of Charters, at least on the basis of his own normative framework, the weakness of his theory will be tested against a new conception of Charters put forward by Wilfrid Waluchow.

Despite the revolutionary character of Waluchow's understanding of Charters, the third chapter will demonstrate that even this new conception is unable to avoid the critique employed by Waldron. Yet, by exploring the basis on which Waluchow's conception would seem to succumb to Waldron's arguments, the fourth chapter will reveal an additional flaw in Waldron's argumentative methodology. On the basis of this additional flaw, it will be contested that Waldron's justification for denouncing Charters is invalid. By itself, his position is insufficient to warrant a denunciation of entrenched constitutional rights and the judicial review through which they are adjudicated. Moreover, there actually seems to be good reason to believe that the constitutional inclusion of a Charter of Rights could be justified on Waldron's own normative grounds.

CHAPTER 1: Appreciating Disagreement

The goal of this project is to investigate the soundness of Waldron's position, and thereby to question his claims concerning the incompatibility of a political decision-making methodology – majoritarianism – with the adoption of the constitutional inclusion of a Charters of Rights and its attendant feature of judicial review. On the face of it, this may seem to be a pedantic endeavor. As noted in the introduction, there are myriad examples of countries which have, by all appearances, seamlessly incorporated such institutions into a democratic framework. Furthermore, there is a rich lineage of political theorists of the highest caliber who readily promote such constitutional arrangements, not only as being conceptually harmonious, but also as being very desirable.[6] So before questioning the soundness of Waldron's arguments it is necessary to explain why this debate is pressing; why his critiques are worth our attention at all. To garner such an appreciation, this first chapter will explore his most important contribution to modern political thought: highlighting the relevance of theoretical disagreement to the project of political philosophy. It is this disagreement that acts as the foundation of his critiques, and it is this foundation that lends his position an authority that warrants our attention.

1.1 Normative Political Theorizing:

[6] Included among these figures are the likes of John Rawls, Jürgen Habermas, and Ronald Dworkin.

Historically the focus of political philosophy has drifted from topic to topic as academic interests have shifted with social circumstances. While subjects such as sovereignty or authority have at times been the paramount points of concentration within this area of study, "the recent emphasis has been on the ideals of justice, freedom, and community."[7] More particularly, this current orientation has heralded a return to one of the more ancient projects of political theory. In the tradition of Plato and Aristotle, the most influential modern political theorists are those who are principally engaged in normative theorizing; in proffering their "own view of what justice consists in, what rights we have, what fair terms of social co-operation would be, and what all of this is based on."[8]

The objective of such conjecture is to make determinations of what social arrangements and/or institutions should be adopted by a society or state. In order to rationally formulate prescriptive claims about how political affairs ought to be ordered, a theorist must first make "judgements of value", wherein the author distinguishes between desirable and undesirable states of affairs.[9] In turn, these judgements are only possible through the application of some measure of the circumstances in question. In the case of normative political theorizing, the philosopher attributes positive decisional weight to some collection of values or norms to act as the gauge of "what is good and useful and

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[7] Will Kymlicka. *Contemporary Political Philosophy: An Introduction.* Oxford: Oxford University Press, 2002 at 2.

[8] Jeremy Waldron. *Law and Disagreement.* Oxford: Oxford University Press, 1999 at 1. Hereinafter *LD.*

[9] I borrow this term from Wilfrid J. Waluchow's, *The Dimensions of Ethics.* Toronto: Broadview Press, 2003 at 32. Also, it is worth noting that this claim appears to be true of both instrumentalist and deontological approaches to political theorizing. Normative theories produce prescriptions, and prescriptions necessarily favor one state of affairs over others. Thus any type of normative position must incorporate, in some manner, judgments of value.

what is not".[10] Thus we find, in every instance of such work, a particular set of foundational values or norms guiding the direction of the particular prescriptions of a given theory.

Over the centuries there have been many different suppositions made regarding what the content and arrangement of such standards properly consist of. From these different perspectives there has sprung a "list of alternative social visions – each of them well worked out philosophically, each offering to do in a different way all the work that there is for [such] a theory…to do."[11] Important to note, is that each alternate social vision makes an appeal to the exclusive legitimacy of their particular conception of the guiding array of values and norms. Plato looked to "right reason" and the underlying order of the universe to justify his choices against all others.[12] Jeremy Bentham attributed the predominance of his position to the fact that it recognized that "nature has placed mankind under the governance" of two primary motivators: "*pain* and *pleasure*".[13] More recently, John Rawls validated the underlying principles of his theory through the use of a thought experiment designed to reveal what many have claimed to be universal human intuitions about the proper norms of political interaction.[14] With the support of these arguments, normative political theorists make recommendations concerning the functioning and orientation of the state, based on their understanding of the relevant

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[10] Aristotle. *Politics.* Robert Baldick and Betty Radice, eds., translated with an introduction by T.A. Sinclair. Middlesex, England: Penguin Books Inc., 1962 at 55 (Bk. 2, Ch. 1).

[11] *LD* 2.

[12] Plato. "Laws." *The Dialogues of Plato: Volume Two* Benjamin Jowett trans. New York: Random House, 1937 at 542 (VI 783a).

[13] Jeremy Bentham. *An Introduction to the Principles of Morals and Legislation.* J.H Burns and H.L.A. Hart eds. London: Methuen, 1982 at 11.

[14] John Rawls. *Theory of Justice.* London: Oxford University Press, 1971 at 18,19. Here I am referring to Rawls' notion of the "original position" of the social contract.

values, and impugn any rival compositions and their resulting prescriptions on the same basis. They argue for the legitimacy of social institutions such as Charters of Rights from within their own normative frameworks. The question that Waldron ultimately poses to the modern political scholar is whether any one such position should be given sway in determinations of social policy.

1.2 Practical Political Philosophy

At the beginning of Book IV of *Politics,* Aristotle claims that the proper enterprise of the political philosopher is:

> ...to discuss the best constitution, what it is and what it would be like if it could be constructed exactly as one would wish, without any hindrance from outside. But that is only the first task. Another is to consider what constitution is suited to what people. For, to attain the best is perhaps impossible; so the good lawgiver and the genuine politician will have regard both to the 'absolute best' and to the 'best in circumstances'.[15]

This passage provides the reader with a valuable insight into the nature of normative political theorizing. Although the essence of such study is to determine how a society or state ought to be ordered, there are at least two different forms in which such an undertaking can be manifested. One can ask for some descriptive leeway and, as Plato did in *Republic*, make postulations about the structure of some ideal society without

[15] Aristotle, 149-50 (Bk. 4, Ch. 1).

being bothered by all the frustrating details of actual political circumstances.[16] Alternately, one can pay great attention to the conditions of real politics and strive to provide prescriptions on the basis of the existent conditions of human political relations. In short, the scope of political philosophy allows for inquiries both utopian and practical in nature.

Recognition of the sundry nature of this enterprise allows us to highlight a potential problem for scholars who are interested in making contributions to the practical side of political theory. Authors intent on providing practical counsel mean to offer rational guidance that is sensitive to the demands of the world that they inhabit. As was noted above, the realization of this enterprise depends upon an accurate appreciation of political dealings. For, to base one's recommendations on an idealized or otherwise inaccurate state of affairs is to include false premises within the arguments that underwrite one's prescriptions. It is to provide conclusions that are justified by facts about a world that is not our own. Thus, an author's observational acuity concerning the world of human politics is directly correlated to the legitimacy of her position as a practical theory, as opposed to a utopian one.[17]

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[16] To be fair to Plato it must be acknowledged that he is one of the few philosophers to ever explicitly be engaged in both types of normative theorizing. While *Republic* was clearly utopian, his later political works, in particular *Laws*, reflects a much more practical attitude towards designing a constitution. This is made evident in colorful discussions of human nature scattered through *Laws*, that are not found in *Republic*, where among other things Plato notes, in apparent frustration, that "man is a troublesome animal, and therefore he is not very manageable, nor likely to become so…" See Plato at 537 (VI 777b).

[17] To reiterate: I understand practical legitimacy/integrity/acceptability as a mark of the suitability of an author's recommendations for implementation into actual human politics as determined by the accuracy of their comprehension of such politics. For example, a theory which recognized that humans are capable of being persuaded by rational discussion bears greater practical integrity than one which bases its prescriptions on the claim that we are incapable of being influenced in such a manner. This standard is not a comprehensive measure of the acceptability of an author's position and recommendations. It is merely a gauge of one important contributing feature of such satisfactoriness.

Given these issues, it is clear that when philosophers ostensibly attempt to engage in practical normative political theorizing they must be vigilant in their attempts to be conscious of the real world of human politics. However, there are many ways that a theorist might fail to achieve the desired accurate appreciation of political states of affairs. There is the danger of a theorist misinterpreting or being misinformed about the facts which support her arguments. She might be undereducated about their subject matter, or unsophisticated in dealing with its minutiae. There also, and this is of particular danger to the academic, hangs the threat of becoming so caught up in the throes of philosophy that it becomes possible for the theorist to unwittingly overlook or ignore those inconvenient features of political life that can sometimes get in the way of making her point. When any of these hazards is realized the practical integrity of a scholar's theory is corrupted.[18] It is with this crime that Waldron charges modern political thought.

1.3 The Relevance of Disagreement

As part of the development of a normative theory that could account for the differences of opinion manifested in entrenched disagreements over various conceptions of the good life, John Rawls was inclined to recognize that "many of our most important judgments are made under conditions where it is not to be expected that conscientious

[18] Attaining perfect practical legitimacy is likely to be impossible as we are continuously learning about the world and thereby having old and commonly agreed on views about it exploded. Moreover, at any given time there are current disputes between experts about the nature of our politics and world. Within those debates the notion of practical legitimacy is likely to be useless except as rhetoric. This concept is best put to work illuminating the difference between views that are obviously idealized and those that are not.

persons with full powers of reason, even after free discussion, will arrive at the same conclusion."[19] Waldron has appropriated this observation, and applied it to matters that go well beyond differing construals of 'the good'. He claims that where political issues are concerned, no topic is exempt from the possibility of such reasonable disagreement. More particularly, Waldron argues that one of the inescapable "circumstances of politics" is that we will "find ourselves living and acting alongside many with whom there is little prospect of sharing a view about justice, rights or political morality."[20] In this way he "extends the Rawlsian conception of pluralism in modern societies to include pluralism of conceptions of justice and conceptions of liberty."[21]

Playing on the fact that ubiquitous political disagreement entails disputes about fundamental values, Waldron goes on to distinguish between two branches of normative political thought in a manner that is remarkably reminiscent of the approach taken by Aristotle. He claims that "there are at least two tasks for political philosophy: (i) theorizing about justice (and rights and the common good etc.), and (ii) theorizing about politics."[22] Both of these tasks are normative undertakings which involve identifying "what we owe each other in the way of tolerance, forbearance, respect, co-operation, and mutual aid".[23] The distinguishing feature of theories of justice is that they understand

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[19] John Rawls. *Political Liberalism* .New York: Columbia University Press, 1993 at 58, in *LD* at 152.

[20] *LD* at 102. For Waldron there is one other fundamental circumstance of politics. It is the "felt need among the members of a certain group for a common framework or decision or course of action on some matter..." He also refers to these as the "circumstances of fairness". See *LD* at 108 and 189.

[21] Thomas Christiano. "Waldron on Law and Disagreement." 19 *Law and Philosophy* (2000): 513-543 at 518.

[22] *LD* at 3.

[23] Ibid. at 1. Implicit in this claim is the fact that in any plausible current conception of normative political theory the guiding value set must be structured in such a way as to allow the framework to account for the existence of other agents who possess political power. So, for example, a theory whose values

themselves to be providing the *right answers* to society's problems, and therefore ought to be approved of by everyone.[24] Such philosophical endeavors sanction the implementation of particular social policies on the basis of some privileged set of principles or values, without accommodating for the controversial nature of their given political perspective and thus their prescriptions.[25] Waldron contends that the confidence in their own normative framework, which compels theorists of justice to promote their own positions as "candidate(s) for moral and political hegemony", also inhibits them from appreciating the fact, and therefore the normative relevance, of deep seated disagreement about their own approaches and recommendations.[26] In this manner they have slipped out of touch with the facts of the world and into utopian contemplations.

While Waldron's goal "is not to discredit or distract" those scholars who are deeply engaged in theorizing about justice; he does contend that if we are serious about using theory to aid us in reaching resolutions about existent problems, then those solutions must be derived from positions that are cognizant of the verities of political life. Theorists of politics must be able to acknowledge the aforementioned "circumstances of politics", particularly the fact of disagreement about the proper tenets of justice and social order. In this way they will be able to tender prescriptions of a practical nature.

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guided one to prescribe that its author be made the undisputed king of the world would not fall within the ambit of legitimate political thought.

[24] As Waldron puts it, "most of us, when we write about rights and justice, write as though there were a truth to the matter. 'And thank God we have got it in this article. Thank God we got hold of it in this book.' "Introduction: Disagreements on Justice and Rights." 6:1 *Journal of Legislation and Public Policy* (2002): 5-10 at 6.

[25] This excepts the fact that, as noted previously, they may include arguments through which to promote the unique legitimacy of their approach against other competing normative frameworks.

[26] *LD* at 2.

Most contemporary normative political theorists do portray themselves as being engaged in practical rather than utopian endeavors, and are very free in giving out advice that is prima facie oriented towards guiding current social/political activities.[27] On this basis one would be forgiven for assuming that they are engaged in political theorizing in Waldron's sense. However, he contends that even including positions such as Rawls', which "have done a good job of acknowledging disagreement, so far as comprehensive views of religion, ethics, and philosophy are concerned", it is still clear that the majority of modern political philosophers have failed to recognize "the inescapability of disagreement about the matters on which they think we *do* need to share a common view, even though such disagreement is...the most prominent feature of the politics of modern democracies".[28] He contends that authors, such as Rawls, are only able to assert the universal acceptability of their positions, by having "wished away" or ignored one of the loci of political disagreement. In this fashion Waldron identifies the bulk of modern political writing as being comprised of theories of justice; and insofar as such work ignores the theoretical ramifications of this relevant feature of politics, as being practically illegitimate. By pointing out that most contemporary political thought fails to "accommodate a politics for those who differ fundamentally about whether theories like Rawls' are correct", Waldron is offering a general indictment of a vast amount of recent

[27] Problematically, that an author is actively attempting to take a practical approach is often not as clear cut as one might hope for. As an example Waldron points out that Rawls uses language that allows him to claim that he is engaged in exploring an ideal society, even though he makes prescriptions that are apparently oriented towards actual political circumstances. See , Waldron. *The Dignity of Legislation.* Cambridge: Cambridge University Press, 1999 at 155 [hereinafter *DL*], and *LD* at 158, where he notes the fact that Rawls "seems quite willing to draw conclusions about American Constitutional Law".

[28] *DL* at 154, 155.

normative political thought, which, he insists, ought thus to be excluded from debates of social policy.[29]

Bearing these allegations in mind, when Waldron presents his own project he is careful to present it as a theory of politics rather than of justice. He positions himself as being completely willing to come to terms with any and all of the difficulties that real political interaction presents, and thereby, as being able to offer counsel that is practically acceptable. After the circumstances of politics, the claim most integral to the development of his argumentative strategy is that the sheer "multiplicity of intelligences and diversity of perspectives brought to bear" on questions of social policy ought to make us wary of perfunctorily presuming that our political disputes are merely a matter of "bad faith, ignorance, or self interest".[30] For Waldron, disagreements about particular points of practice are best understood as being disputes between those who have thought "long, hard, and conscientiously" about the matter at hand.[31] The fact that there "are a number of distinct intelligences" demanding different solutions to common problems does not indicate some failure on the part of any individual position.[32] Rather it throws any single conception of the "criteria of wisdom" concerning political issues into doubt.[33] It forces

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[29] *LD* at 3. On this last point, Waldron goes on to state that:
...philosophers of public affairs should spend less time with theorists of justice, and more time in the company of theorists of authority and theorists of democracy, reflecting on the purposes for which, and the procedures by which, communities settle on a single set of institutions even in the face of disagreement about so much that we rightly regard as so important. We need...to see that as a distinct agenda, not one to be engaged in simply as pursuing the procedural implications of a particular substantive view (Ibid.).

[30] Ibid. at 112.

[31] Ibid. at 110, 229.

[32] Ibid. at 229.

[33] Ibid. at 115. Waldron continues: "If the mark of wisdom is having come up with just decisions in the past, and people disagree about what counts as a just decision, then it is not clear how we can determine who is wise and who is not..." (Ibid.).

us to recognize that no single compass of political morality stands alone as being obviously reliable.[34] Given these conditions, Waldron contends that all political perspectives must prima facie be construed as being worthy of "equal respect".[35] Moreover, since we must equally respect every opinion "about what counts as a substantively respectful outcome", it is incumbent upon practically oriented normative political positions to avoid the hubris of positing solutions to such issues. Rather, they ought to restrain themselves to discussing what would count as appropriate political procedures, given such circumstances. He claims that:

> The integrity of a substantive theory of social policy or social justice is the integrity of a single mind: but we are faced with many minds and many theories on almost every issue. Procedures of political decision making are a response to this plurality: that is, they are a response generated by a felt need that there should be on a certain view that counts as *ours*, even despite the fact that *we*, plural, disagree.[36]

It is in this light that Waldron makes his political prescriptions. He argues for the adoption of political structures that do not advantage or privilege any given set of political consequences over others; that the circumstances of disagreement call for political procedures that allow the opinion of every citizen to count equally in the determinations of the state. It is from this platform that Waldron, as Thomas Christiano notes, goes on to suggest:

> ...the elements of a theory of legal interpretation that severely circumscribes the legitimate role of judges in shaping the law. In particular he argues that judges ought not to have the authority to strike down democratic legislation...hence he argues strenuously against the legitimacy of judicial review [and Bills of Rights]

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[34] Ibid. at178.
[35] Ibid. at 116.
[36] Jeremy Waldron. "Freeman's Defense of Judicial Review." 13 *Law and Philosophy* (1994): 27-41 at 34.

> in the United States and hopes to fend off calls for [their] introduction in other democratic societies.[37]

Thus, rather than floundering on the facts of entrenched political disagreement, Waldron is able to use the circumstance of politics to guide his prescriptions concerning pressing social debates, such as the primacy of majoritarian decision-making and the correlate illegitimacy of Charters and judicial review.

1.4 A Practical Hope for Theories of Justice?

Despite the force of Waldron's arguments against the inherent flaws of participating in discussions of social policy on the basis of counsel derived from theories of justice, many scholars, who have long been engaged in such activities, continue in their work unabated and seemingly unphased. If this behavior was excused as occurring solely on the basis of utopian *slips* before Waldron's enlightening work, how ought it to be construed after the widespread attention that his stance has garnered for the relevance of deep seated political disagreement? The fact is that such disagreement is not as novel a topic as Waldron's work might lead one to believe, and, there is a potential solution available for those theorists of justice who wish to evade his critiques concerning practical illegitimacy. In order to avoid the brunt of attacks grounded in ubiquitous disagreement, one must simply refute the all-pervasiveness of such discord by identifying one or more features of politics or political morality that everyone agrees upon. In other

[37] Thomas Christiano. "Waldron on Law and Disagreement." 19 *Law and Philosophy.* (2000): 513-543 at 516.

words, it seems possible that Waldron's critique of theories of justice might be rebutted through a successful empirical appeal to consensus.

There are a number of authors who think that there is hope to be had along these lines. Ronald Dworkin, for example, has acknowledged the *appearance* of deep seated disagreement about political morality, but he has consistently claimed that what we are encountering is only a façade. He contends that under close scrutiny, it is clear that all plausible normative political theories (running the gamut from Marxism to Libertarianism) are nothing more than different ways of playing out the same moral insight. They all express, in one way or another, "different conceptions of equality".[38] For Dworkin, awareness of this fact reveals the existence of a universally appreciated "right to equal concern and respect...,more abstract than the standard conceptions of equality that distinguish different political theories."[39] Thus, regardless of Waldron's arguments, and even in the face of the appearance of dissensus, some authors hold to claims about the existence of consensus on certain substantive points.

The problem with assertions like these are the contortion necessary to justify them. As Frank Michelman points out, "It is not clear how we can say that a constitutional norm such as [Dworkin's] 'equality of concern and respect' remains invariant – remains one and the same norm under reasonably contesting major interpretations of it."[40] In other words, the very people who supposedly agree about a

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[38] Ronald Dworkin. *Law's Empire*. Cambridge, Massachusetts: Harvard University Press, 1986 at 299. See also Dworkin 1977: 179-193, 1983: 24, and 1987: 7-8.

[39] Ronald Dworkin, *Taking Rights Seriously*. Cambridge, Massachusetts: Harvard University Press, 1977 at 180.

[40] "Morality, Identity and 'Constitutional Patriotism" 4 *Denver University Law* Review (1999): 1009-28 at 1023.

substantive point like equal concern and respect will inevitably have very different conceptions of what it is that they are in accord about. Given this diversity of opinion, which inexorably engenders a variety of positions on social commitments and desired outcomes, the viability of the claim that people have thereby achieved consensus on any substantive point is highly dubious.

Jurgen Habermas, cognizant of this problem, seeks to identify the locus of consensus "in the intuitive meaning of a performative rather than in an explicit propositional content".[41] Rather than trying to convince the reader that everyone shares some particular set of ethical beliefs or intuitions, theorists like Habermas assert that, "a convincing candidate for meeting such an improbable requirement must be 'thin' rather than 'thick', rooted rather in the intuitive meaning of a performance than in an explicit propositional content."[42] On this basis he suggests that there is consensus implicit in the fact that "citizens must see themselves as heirs to a founding [political] generation, carrying on with the common project."[43] Thus non-moral but shared understandings of human action may provide the consensus necessary to develop a practical theory of justice.

While this approach is a far cry from the position taken by Dworkin, it too runs into problems. The problem is that in order for any such "thin" position to be a point of consensus, everyone in a political community must to be able to settle on a single descriptive perspective in understanding some given set of circumstances. The difficulty

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[41] Jurgen Habermas. "On Law and Disagreement. Some Comments on 'Interpretive Pluralism'." 16:2 *Ratio Juris*. (2003): 187-94 at 193.

[42] Ibid.

[43] Ibid.

of this feat is aptly demonstrated by Habermas' choice of the conditions on which to pin his aspirations for universal political agreement. It is very easy to conceive of some group of citizens, particularly those disadvantaged by the political policies of the state, who intuitively understand themselves, not as heirs to the political norms of a country, but as standing outside of the common project; as a group outcast and ostracized from the lineage of the national politics. Moreover, it seems reasonable to assume that standpoints which vary in this manner would provide for the development of somewhat different normative frameworks. Thus, because of the likelihood of different political viewpoints, the existence of which is reinforced by Waldron's arguments about the multiplicity of perspectives and intelligences, these "thin" points of descriptive agreement seem no more likely to garner universal acceptance than "thick" conceptual ones.

The positions of Dworkin and Habermas illustrate two contrasting approaches to rebutting Waldron's contentions about the absolute pervasiveness of disagreement. However, neither position appears able to provide a likely candidate point of consensus capable of underwriting a *practical* theory of justice. More importantly, the breakdown of these positions reveals how doubtful it is that either of two vast categories of candidate points could ever produce a premise which might gain universal acceptance. While it would be impossible to prove that there is no position on which everyone could agree; Waldron's arguments to that end seem only more convincing following this brief evaluation of some positions which deny his fundamental premise. Thus it appears that the practical hopes of theories of justice truly are dashed by pervasive disagreement.

1.5 A Worthwhile Investigation

If the dream of a normative political framework legitimized and justified by its universal endorsement seems to be unrealizable, then the prescriptions of authors like Rawls appear destined to be cast out of the arena of practical political theorizing. It seems necessary to turn to theories of politics if we desire realistic solutions to our debates on social policy. However, although Waldron is among the staunchest proponents of such theorizing, it is important not to perfunctorily assume that his position is the most viable option within this second category of normative positions. In fact, there is at least one aspect of Waldron's theorizing that has attracted a barrage of critique. That being said, this section will argue that his perspective taps into a particular theoretical proclivity that ensures its relevance to contemporary debates of social policy.

1.5.1 An Incoherent Claim

Before arguing for the importance of Waldron's position within the Charter debates, there is one glaring error within his perspective that must be acknowledged. Many authors, including Aileen Kavanagh, Joseph Raz, Thomas Christiano, and Wilfrid Waluchow, have accused Waldron of failing to follow through on the logic of his own position.[44] As has been previously noted, Waldron argues passionately for the political primacy of majoritarian legislation, and correspondingly for the rejection of Charters and

[44] Indeed, this point is the weakness most frequently engaged by critics of his position.

the practice of judicial review, and all on the basis of the circumstances of disagreement. However, this endorsement of some political procedures and the rejection of others is out of keeping with part of his argumentative strategy.

As has already been noted, in illustrating the direction of his own normative arguments, Waldron claims that theories of politics ought to take no normative position on the substance of particular policies, because such prescriptions could only be seen as hubristic, given the disagreement concerning such issues. On this basis he argues that the arena of practical political theorizing ought to be restricted to questions of political procedure. The trouble is that if Waldron is correct in claiming that political disagreement is ubiquitous, then it does not just occur in regards to the content of a community's political decisions. One also "ought to expect disagreement about *the legitimacy of the collective decision procedures*" through which such questions are resolved.[45] And given that this is the case, it seems no less disrespectful to offer theoretical solutions concerning the proper procedures of community decision-making, than it does to ignore them on the decisions which might issue from such procedures. It is in this manner that Waldron finds himself in a quandary. If he is correct, and the circumstance of disagreement undermines the prescription of any particular social policy put forward by a normative theory, then it seems that he must also reject any and all prescriptions regarding what counts as proper procedures for arriving at determinations of such policy, including his own. Thus, if Waldron's arguments are cogent, they deny him the ability to "establish the propriety of participatory majoritarianism as a decision

[45] Christiano (2000), 520.

making procedure", or, for that matter, any other prescriptive claim.[46] Despite offering a practical approach to normative theorizing by acknowledging the disagreement inherent in political discussions, Waldron's position can be seen to undermine the legitimacy of his own political counsel.

Moreover, this conceptual problem, encountered by Waldron, is not shared by every practical theory of politics. Many of the authors who were noted as calling Waldron to task on this issue, have gone on to propose normative positions that, while acknowledging ubiquitous disagreement, are not caught up in this conceptual quicksand. They have moved on from the dilemma faced by Waldron, and have presented theories that are both practical and coherent. Thus, there is at least one good reason for calling the relevance of Waldron's position to the practical debate, concerning Charters, into question. However, even with this conceptual baggage, Waldron's position is still well worth consideration.

1.5.2 What Stands Beside Disagreement

As was noted earlier, any piece of normative theorizing requires not only a conception of the world to which its prescriptions relate, but also a value-set to act as the guide through that conception. Thus every piece of practical political theorizing must include a view of politics that acknowledges the ubiquity of disagreement in conjunction with some value-set. In the case of Waldron's normative framework, he combines his

[46] Aileen Kavanagh. "Participation and Judicial Review: A Reply to Jeremy Waldron." 22 *Law and Philosophy* (2003): 451-486 at 467.

practical perspective on the circumstances of politics with a version of the political liberal "principles of fairness and equality".[47] Thus, the only *major* conceptual point which appears to divide his position from modern liberals, such as Rawls and Dworkin, is his recognition of the relevance of omnipresent political disagreement. On this basis, Waldron's theoretical perspective is best understood as an attempt to rework the political liberal theory of justice into a theory of politics. In this manner he pushes on the insights of some of the greatest proponents of Charters, and amazingly arrives at a critique of such constitutional mechanisms. Thus, Waldron argues against the positions of Dworkin and Rawls, while staying true to, indeed, while arguing on behalf of, the "liberal instinct" towards pluralism.[48] In this manner, he positions himself as the practical voice of political liberalism within the Charter debates; a voice condemning Charters.

Although other authors have incorporated the fact of omnipresent disagreement into their own normative frameworks, none have been content with the purely "democratic values" of fairness and equality advanced by Waldron. Instead, these authors inevitably enrich this moral position through the inclusion of other values or principles.[49] For example, Aileen Kavanagh incorporates a strong "interest in autonomy" within her motivating set of political principles.[50] On the other hand, Thomas Christiano proposes a "new start" to such theorizing with the fundamental principle being "the equal

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[47] *LD* at 234. I use the term 'political liberal' to distinguish contemporary liberal scholars, whose value sets are focused primarily on these two principles from those who hold traditional liberal views that identify autonomy and liberty as being fundamental (authors in this category would include the likes of J.S. Mill and Isiah Berlin). Waldron is identified with this group because his political perspective is developed by using the fact of disagreement to further develop the insights of both Rawls and Dworkin. See *LD* at chapters 7, 9 and 11, and *DL* at chapter 6.

[48] *LD* at 75.

[49] Kavanagh, 482.

[50] Ibid. at 482, 486.

consideration of the interests of persons", rather than fairness and equality for their own sakes.[51] So, while other positions within the Charter debate, such as those proffered by Kavanagh and Christiano, are able to accommodate pervasive disagreement without being conceptually undermined, they are also unable to take as much advantage of one of the most powerful normative proclivities within contemporary political thought. Thus, even in the face of an internal conceptual conflict, Waldron's theory and its resultant prescriptions possess a unique status, and thus retain a large degree of theoretical significance. Although according to his own arguments, it would seem that the prescriptions Waldron makes concerning the legitimacy of majoritarian decision-making and the illegitimacy of Charters and judicial review should be barred from social debate, the practical orientation, and political instincts that drive his position are weighty enough to make his thoughts on these matters well worth considering.[52]

1.6 Conclusion

This chapter focused on exploring why Waldron's critique of Charters of Rights and judicial review are worth our attention. The discussion began with an account of the nature of normative political theorizing, and with the claim that Waldron has taken issue with a large part of such contemporary thought. By comparing distinctions made by

[51] Christiano (2000), 539, 540.

[52] It is important to note that this project will not be working under the assumption that the values adopted by Waldron are the right ones. Indeed, such a claim would stand in spite of Waldron's contention that the circumstance of disagreement makes it impossible to identify the *correct* normative position. Rather, his position is worthy of consideration because it appeals to political values that hold great influence over the opinions of many individuals engaged in the debate concerning Charters.

Aristotle and Waldron, concerning different types of such work, it becomes clear that Waldron is genuinely concerned about the willingness of so many modern theorists to proffer political counsel regardless of the fact that their prescriptions ignore a prominent fact about the nature of political interaction. In supposing that their positions represented the *obviously* right way to think about politics, Waldron claims that these theorists failed to give credence to the fact of omnipresent disagreement. By pointing out this oversight, Waldron believes himself to have undermined the practical relevance of much recent political thought concerning issues of social policy. However, in proffering his own theory, which is based on avoiding such shortcomings, Waldron seems to have placed himself in the rather uncomfortable position of making claims about the illegitimacy of Charters and judicial review in spite of the logic of his own position. Yet, even so, by entering the fact of ubiquitous political disagreement into the political liberal calculus, Waldron has established himself as the flag bearer of practical political liberal thought within the Charter debates. On the basis of this pedigree, his position possesses an intuitive credence that may well transcend its theoretical difficulties. It is the lineage into which Waldron has placed his own theory, in conjunction with the theoretical use of the circumstance of political disagreement, which makes his condemnation of Charters relevant to current debates on policy. It is on these grounds that a response to his political prescriptions, which are so at odds with the conventional wisdom concerning the value of Charters and judicial review, is justified.

CHAPTER 2: An Idealistic Endorsement?

With an understanding of the relevance of Waldron's perspective in hand, it is now feasible to move onto a critical discussion of the particularities of his theoretical framework. This project will not argue against Waldron's predilection towards political liberalism. Rather, the coming discussion will question whether he has done an effective job in teasing out the implications of his own position. It will question whether those committed to respecting pluralism, on the basis of the values of fairness and equality, really are bound to reject Charters, as he claims.

In order to effectively achieve this end, this chapter will be divided into two broad sections. The first will be used to more thoroughly elucidate Waldron's fundamental critique of Charters of Rights, and correspondingly to explain what he finds to be so "valuable and important" in the idea of modern democratic legislatures.[53] The second section will investigate the notion of such government to determine whether Waldron's endorsement of them is as well placed as he believes. In the end, it will be contended that the very grounds on which Waldron argues for the "dignity of legislation", cast doubt upon the theoretical primacy of contemporary majoritarian decision-making.[54]

2.1 Representation Rather Than Rights

[53] *DL* at 5.
[54] Ibid. at 1.

Where the earlier discussion of Waldron's position provided a brief overview of his normative prescriptions and the arguments that justify them, this section will revisit his reasoning and recommendations in greater depth. However, before engaging Waldron's positions outright, it is worth acknowledging that his opinion was given from within, and was to some degree molded by the context of the ongoing debate about Charters. In light of this, Waldron's perspective is best understood by being juxtaposed against that background. Therefore, the discussion of his own position will be momentarily postponed in order to set the scene.

2.1.1 The Debate

Broadly described, much of the discourse concerning the democratic compatibility of Charters can be framed as an argument about what constitutes acceptable forms of political decision-making procedures. More particularly, and more usefully for the purposes of this discussion, the discourse on this topic can also be understood as a debate concerning the proper distribution of legislative influence given to the various normative perspectives within a polity. It is here that Waldron's position is distinguished from the bulk of advocates, along lines that will be familiar from the previous chapter.

As law-creating establishments, it is an integral feature of every state with an identifiable legal system to have some recognized procedure for making determinations

of social policy.[55] Moreover, in the case of modern nations, those decision-making schemes generally appear to have been deliberately adopted as the result of normative reckoning.[56] As mentioned previously, where such reasoning is at play, it is inevitable that the introduction of such a process will have been tied to some set(s) of values, which, in this case, determine the nature and structure of such institutions. In other words, there are certain values which possess *formative influence* over the character of the decision-making procedures of any modern polity. In this manner every state *necessarily provides* at least one privileged point of legislative influence to whatever array of political values contribute to the delimitation of the decision-making process itself.[57] Moreover, the procedures adopted on the basis of this formative influence can (*but need not*) entail another point of legislative influence by political values. The adopted procedures can themselves privilege some set of political principles. They can institute an internal, rather than a formative, influence over the legislative dealings of the state, by giving greater influence to some value set, or sets, *within* the process of law-making itself, rather than upon the form of the process.[58]

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[55] I take this point from H.L.A. Hart's notion of the "rule of recognition". See *The Concept of Law.* Oxford: Clarendon Press, 1961 at 92. Hereinafter *CL.*

[56] Though it may be claimed, along with authors such as Hannah Arendt, that "the principle of majority rule is inherent in the very process of decision-making", I believe that a distinction needs to be made between the adoption of such procedures in a non-legislative setting, and their introduction into the constitution of a state. See *On Revolution.* Harmondsworth: Penguin Books, 1973 at 164.

[57] This does not entail that the given set(s) are readily discernable. For example, though many nations have adopted democratic decision-making mechanisms, one need only open a text on democratic theory to appreciate the variety of conflicting positions concerning the values that might motivate the implementation of majoritarian processes. Moreover, as implied by the "(s)", it may be that such institutional arrangements are endorsed by a wide variety of value sets that are compatible on this issue; that there is some kind of commensurability or overlap in justificatory principles and conclusions.

[58] These values can, but need not, be the same as those possessed of formative influence.

Popularly understood, in relation to community decision-making, Charters are the constitutional entrenchment of rights of political morality; the function of which is to act as a normative restraint upon the spectrum of valid legislation which may be enacted by a state.[59] To use Waldron's parlance, they act as "substantive" restrictions, as limits upon the particular outcomes of a given decision-making procedure, by constraining the scope of possible political decisions *on the basis* of some advantaged set of values.[60] By privileging one set of values over others, in determining which laws will pass muster in a state, Charters, and substantive restrictions more generally, operate as internal legislative influences. Thus, to make a case for their adoption is to argue for an institutional arrangement wherein some specific set of political principles or values is granted more legislative weight than is theoretically required by a law-making system.

It has been the adopted task of very prominent political scholars, particularly theorists of justice, to defend this type of internal influence. Most significantly, Ronald Dworkin and Samuel Freeman have developed an argumentative strategy to positively frame the broad legislative sway given to particular sets of political values by Charters, with specific reference to their introduction into democratic states. They claim that in order to appreciate the type of normative imposition made by Charters, we must first "look to the values and ideals *in virtue of which* we hold such procedural aspects of

[59] The notion of entrenchment is very important. By being constitutionally entrenched, Charters are immune from the normal manners of legal change. They are less readily altered than normal statutes. Also, this function of Charters is only one of many that may be attributed to them. However, because this particular function is at the center of Waldron's critique of such constitutional mechanisms, it will be the focus of this discussion.

[60] *LD* at 107-108. This may be a controversial reading of the term 'substantive'. Dale Smith notes that Waldron never clearly defines this term for his readers. He understands the notion slightly differently, as referring to restrictions which "make essential reference to what each political actor believes should be done (as opposed to what a single specified individual or group believes should be done)." See "Disagreeing with Waldron: Waldron on Law and Disagreement" 7 *Res Publica* (2001): 57-84 at 59.

democracies as equal political rights, majority rule, and political accountability important".[61] As Freeman points out:

> Among the list of rights and liberties which constitute a part of the freedom of sovereign democratic citizens are liberty of conscience and freedom of thought, freedom of association and of occupation, such rights and liberties as are necessary to maintain the independence and integrity of the person, and the rights and liberties implicit in the rule of law.[62]

If one can accept this depiction, then the values commonly understood to underwrite democratic processes appear to be commensurate, if not identical, with those that are often found manifested in the rights embodied in Charters. By demanding that majoritarian decisions only be accepted as law if they are in accord with democratic values, Charters can be seen to function as an integral member of the nexus of "political institutions whose structure, composition, and practices" insure that a nation's law is in accord with democratic principles.[63] By augmenting majoritarian processes, Charters, and the judges who preside over their application can insure justificatory parity between a state's formative values and its decisional outcomes. In other words, Charters are able to contribute to the normative integrity of the legislative landscape of a nation. It is such arguments for "modified majoritarianism", and their implicit support for the enhanced influence of particular political values, that Waldron seeks to subvert.

2.1.2 The Conditions of Respect

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[61] Samuel Freeman. "Constitutional Democracy and the Legitimacy of Judicial Review." 9 *Law and Philosophy.* (1990-1991): 327-at 339. My emphasis.

[62] Ibid. at 347.

[63] Ronald Dworkin. *Freedom's Law: The Moral Reading of the American Constitution.* Cambridge, Mass: Harvard University Press, 1986 at 17.

Though in this instance his arguments are aimed against the institutional, rather than theoretical, privileging of political values, Waldron's position is once again girded by the fact of ubiquitous disagreement. In the last chapter it was noted that through an appreciation of the scope of disagreement, he is left with the understanding that where discussions of social policy are concerned, there is simply no neutral manner through which to identify the 'right' values or principles that could be used as a guide to such decisions. Because the circumstances of politics leave a community without an unbiased method of certifying the truth about political values, it would seem that when deciding upon the nature of its institutions every state faces a choice. It must be determined whether the actions of a state ought to be decided on the basis of procedures which accord extraordinary influence to some disputed set of values to the exclusion of others, despite the disagreement that will surely attend to any such choice, or whether an attempt ought to be made to show procedural consideration for the varying political positions existent within a given society. As has been previously noted, Waldron quite forcefully counsels the second approach on the basis of the liberal values of fairness and equality.

He argues that there are at least two manners in which a state can, *and ought*, to procedurally manifest *respect* for the political disagreement prevalent among its citizens, in regards to its lawmaking. First, because there is no way to verify which is the right or wrong normative approach to politics, there can be no rational basis on which to exclude any position from political influence. On this basis, Waldron claims that a state must "not require anyone's sincerely held view to be played down and hushed up".[64] Instead it

[64] *LD* at 109.

must develop institutions that encourage people "to listen to one another and to settle on a common policy in a way that takes *everyone's opinion into account*".[65] Thus, a respectful system is one that provides for the enfranchisement of every possible conception of political justice and political values. There must be no view, no position, left behind. The second point relates to how each enfranchised position must be treated within the procedures of political decisions-making. According to Waldron, the state must attach "positive decisional weight to the fact that a given individual member of the group holds a certain view".[66] But more importantly, provisions must be made which accord "maximum decisiveness to each member [of the polity], subject only to the constraint of equality".[67] The decisional weight of everyone's point of view must be the same. Thus, the circumstances of disagreement, in conjunction with the values of fairness and equality, yield two *conditions of respect*: that everyone's position be respected, not only by its inclusion, but also by its being given equal influence in determining the operations of the state.

2.1.3 The Principle of Majority

It is immediately evident that the previously mentioned argument from integrity, with which Dworkin and Freeman gloss the imposition of Charters, fails to speak to these conditions. If one can accept Waldron's contentions concerning the ubiquity of political

[65] Ibid. at 110. My emphasis.
[66] Ibid. at 113.
[67] Ibid. at117. The process he is referring to here is decision-making.

disagreement, then while there may be some positive value in the fact that a nation's law is created in accord with a single set of principles, this point in no way mitigates the fact that such benefits are only accrued through the unfair privileging of one value set over others.[68] On this basis, Waldron cannot endorse any decisional procedures that entrench substantive restrictions on legislation, for this manner of "folding substance back into procedure will necessarily privilege one controversial [set of political values] and accordingly *fails to respect* others".[69] He must reject the adoption of Charters as being incongruous with the conditions of respect. Thus, his acknowledgement of the circumstance of disagreement carries Waldron in the very opposite procedural direction of that promoted by Dworkin and Freeman.

With these conditions embodying the formative influences of his theory, it would seem that Waldron is bound to whichever legislative arrangement can best accommodate them. It has already been noted that when comprehensive legislative control is given to some substantively privileged set of political values these conditions are infringed upon. So what form of decision-making procedure is capable of honoring these conditions of respect?

> *When we put the question this way, it seems we can move directly to the majority principle as the obvious answer.* For it can be demonstrated that no other principle gives greater weight to the views of any individual member, except by giving their views greater weight than that assigned to those of some other individual member. Indeed, the method of majority-decision attempts to give

[68] The positive value, that might be accrued, would likely come from such practical sources as the enhanced predictability of the law.

[69] Ibid. at 116. My emphasis.

> each individual's view the greatest weight possible in this process, compatible with an equal weight for the views of each of the others.[70]

In fact, Waldron suspects, though he readily admits that it would be impossible to prove, that this "pure majoritarianism" is "the only decision-procedure consistent with equal respect in [the] necessarily impoverished sense" demanded by the circumstance of disagreement.[71] Thus, the fact of disagreement has led Waldron to deny the legitimacy of any decision-making procedures or influences other than the purely majoritarian, which he asserts to be the most effective in accommodating the fair and equal distribution of legislative influence.[72]

2.2 An Idealistic Proposition?

Waldron's point, in arguing that the majority principle is best able to accommodate the circumstance of disagreement, is to reintroduce a sense of dignity into the idea of modern representative legislation and legislatures, while simultaneously denigrating the role of Charters and the courts, in terms of political decision-making.

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[70] *DL* at 148 It worth noting that this is Waldron's answer, **only given** the circumstance of pervasive disagreement. He states:

> ...a conception of equal respect which is responsive to proven or acknowledged differences in reason, wisdom, and experience may justify some sort of plural voting scheme, rather than the equal weight implicit in plain majority-decision. Whether it is possible in the circumstances of politics to *justify* (or agree upon) criteria of wisdom etc. for the purposes of these differentiations is another matter. (Ibid.)

[71] *LD* at 116.

[72] While Waldron is convinced of the relationship between the circumstance of disagreement and this decision-making procedure, there may be other, equally acceptable, manners of playing out the implications of political dissensus. For instance, Robert Paul Wolff discusses a "principle of equal chance" and "a system of legislation by lot" that seem capable of equaling both the conditions of respect and majoritarian procedures in their ability to show consideration for the circumstances of disagreement. See *In Defense of Anarchism.* New York: Harper and Row Publishers, 1970 at 44-45.

However, given his methodology, it is unclear that such conclusions are adequately provided for. For though he argues on behalf of the majority-decision, he does not discuss how this notion translates into *representative systems* per se, let alone how it is exhibited in actual modern democratic practice. Instead he talks about "respect, in terms of majority-decision in a direct democracy".[73] This equivocation raises some difficult questions for his position.

In the first chapter it was noted that Waldron understands his own work to be a matter of "theorizing about politics", in that it takes very seriously the task of theorizing on the basis of the verities of the political world.[74] However, this commitment to descriptive accuracy, which is integral to the practical legitimacy of his position, is played out in his efforts to acknowledge the existence and implications of the circumstance of disagreement. In equivocating between majoritarian decision procedures per se, and modern representative democracy, Waldron acknowledges that his conclusions are grounded in a "a rosy picture of legislatures, and their structures, and processes that matched, in its normativity, and perhaps in its naivety, the picture of courts" that has long permeated the writing of legal and political philosophy.[75]

Wilfrid Waluchow characterizes this argumentative strategy as follows:

> Waldron's attack on Charters, Charter review, and the reasons usually offered in their defense, combines a **stark realism**, concerning the prospects of agreement and pre-commitment in the circumstances of politics, with a professed **idealism** concerning the underappreciated possibilities of majoritarian self-government.[76]

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[73] *LD* at 109.
[74] Ibid. at 3.
[75] Ibid. at 32.
[76] *CLT* at 423.

In spite of this dichotomy, some authors, such as Dale Smith, have claimed that "it is no objection to [Waldron's] view that it is idealistic, if those defending judicial resolution of political decisions rely on an equally idealistic" set of premises.[77] However, this view does not deal with the problem adequately. Waldron argues for the dignity of modern parliamentary democracy on the basis that it best honors the circumstance of disagreement. This stance leaves the primacy of modern parliamentary democracy open to being matched or even trumped by any other decision-making process on the basis of such a procedure's efficacy in fulfilling those procedural preconditions demanded by disagreement. Indeed, if another equally, or more effective institution were to appear, then integrity would demand that Waldron acknowledge its parity with, or even precedence over, modern representative democracy. On this basis, it may be possible to undermine the legitimacy of Waldron's conclusions concerning the unique dignity of majoritarian legislation and the attendant rejection of Charters, without rejecting the liberal values which guide his endeavor.

In order to determine whether this is possible, the first thing that must be done is to ascertain the degree to which modern legislative democracies actually embody the procedures of direct democracy which Waldron endorses. It is this point that will occupy the remainder of the current chapter.

In order to determine the degree to which Waldron has glossed the processes of the modern legislature, representative majoritarianism must be contrasted with direct majoritarian procedures, thereby revealing any relevant disparities in its ability to respect

[77] Smith, 64.

the circumstance of disagreement. This comparison will be made in two parts. The first will point out conceptual inconsistencies inherent in the notion of representation, while the second will investigate the theoretical implications of the most prominent procedural feature of *existing* democratic systems. However the presentation of direct majority-decision procedures, and their relationship to the circumstance of disagreement, has not yet been developed sufficiently to support such a comparison. Thus, this investigation will start with a more thorough investigation of the nature of direct majoritarianism as called for by Waldron's position.

2.2.1 Respectful Majoritarianism

It has already been noted that Waldron has derived two formative conditions of respect, from his normative matrix, that guide his choice in decision-procedures.[78] These preconditions require that the decisions made by a polity are determined through processes that accommodate the total enfranchisement of the people and their respective political perspectives, and that insure an equal distribution of political influence among them. On this basis Waldron is led to espouse the virtues of a particular conception of direct democracy. The purpose of this section is to more fully explicate the nature of Waldronian majoritarianism, so that it can act as an effective foil in the upcoming discussion of the dignity of representative democratic legislation.

[78] This matrix is the circumstance of disagreement in conjunction with the values of fairness and equality.

To appreciate the nature of Waldron's stance, it is necessary to distinguish his position from a different strand of democratic theory. In what Adam Przeworski refers to as the "original democratic ideology", majoritarianism is inevitably tied to the notion of political unanimity.[79] For authors such as Jean-Jacques Rousseau and Immanuel Kant, acts of government are only legitimate if they issue from a people united in their opinion on how to respond to a given political issue.[80] However, such positions pay no heed to the circumstance of disagreement. Thus Waldron rejects "consensus as the internal logic" of the decision-making procedures of the state.[81] For him, the decisions of the state need only reflect the will of the majority, not the whole.

There is a further set of democratic views, from which Waldron's position is distinguishable. In *Considerations on Representative Government*, John Stuart Mill differentiates between two aspects of the decision-making workload in a democratic state. First, because there are inevitably a variety of options concerning how to direct government action in any situation, there is the matter of determining the content of the choice to be made in a given political decision. Second, there is the matter of the actual decision itself, as based on the content of the previously identified choice. Mill argues that the identification of the solution(s) to an issue should be delegated to some body

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[79] Adam Przeworski. "Self-Government in Our Times." Working Paper, 2005. (April 13, 2006), http://www.nyu.edu/gsas/dept/politics/faculty/przeworski/papers/ alternation. pdf#search=%22Przeworski%2C%20Adam%20%2B%20Self-Government%20In%20 Our%20Times%22 at 3.

[80] Rousseau states that "in place of the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains votes, and receiving from this act its unity, its common identity, its life and its will." See *The Social Contract*. Translated with an introduction by Maurice Ganston. Middlesex, England: Penguin Book Inc., 1968 at 61 (Bk. 1, Ch. 6). While Kant talks of the "fundamental law thus indicated, which can only arise out of the universal united will of the people". See "The Principles of Political Right" in *Kant's Political Principles* (1793) ed. and trans. W. Hardie (Edinburgh: T&T. Clark., 1891) at 43.

[81] *LD* at 91.

outside of the group that is making the final determination of state policy. In his own words, such an independent agency would "embody the element of intelligence" of the community, whereas "Parliament would represent that of will".[82] Correspondingly, the people, as represented in Parliament, "should have no power to alter the measure, but solely to pass or reject it."[83]

It is clear that Waldron's position cannot accommodate such a division of decisional labor. For, the substance of the options proffered controls the nature of the decision made. As an example, suppose that there is a problem facing a direct democracy whose members support a variety of possible solutions. If only one of those solutions is placed on a ballot, then only that one remains as a live option in the remainder of the decision-making process. To restrict the options on a ballot in this manner is to privilege the perspectives of those individuals who establish the possible choices for the rest of the group, while infringing upon the view of anyone favoring an outstanding alternative. Consequently, regardless of the parity of the voting procedures themselves, the overall decision-making process would fail to accommodate Waldron's conditions of respect. Hence, the circumstance of disagreement demands more than a decision-procedure which simply tallies everyone's votes on some issue. It also demands the public's unfettered participation in determining the nature of the possible solutions to whatever issue is in question.

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[82] John Stuart Mill. "Considerations on Representative Government." *John Stuart Mill On Liberty and Other Essays*. John Gray ed., Oxford: Oxford University Press, 1991 at 279.

[83] Ibid. at 280. As Waldron notes, this view is seconded by Rousseau, who states that "he who frames the laws...has not, or should not have, any rights of making law". See *The Social Contract* at 103 (Bk. 2 Ch. 7) in *LD* at 71.

So although Waldron is not willing to go so far as to postulate some shared will which unifies the decisions of a population, in a manner akin to Kant and Rousseau; neither is he comfortable with privileging the intelligence of some particular group within the community. Waldron's conditions of respect demand that the decision-procedure adopted accommodate a politics for which unanimous decisions are unfeasible, without thereby relying on a hierarchy of political influence.

The value of direct democracy to Waldron's arguments is that it calls for every member of the polity to participate. When *everyone* participates in a procedure "that gives *equal* weight to each person's view in the process by which one view is selected as the group's", then it is assured that the final policy determination will have been *equally responsive to the views of everyone* in the polity.[84] In a direct democracy the political equilibrium called for by Waldron's normative matrix is readily attained. Direct majoritarian democracy perfectly accommodates the conditions of respect.

2.2.2 Democratic Representation: The Concept

While it can be assured that a direct democracy can provide for this perfect balance of political influence, the actual implementation of national direct decision-making systems is generally regarded as being practically unfeasible.[85] As Robert Paul Wolff states, "the total citizenry may be too numerous to meet together...and...the

[84] *LD* at 114.

[85] This having been said, there is a great deal of developmental work going on at the moment to harness the power of the internet in order to facilitate such procedures.

business of government may require a continuous attention and application which only the idle rich or career politician can afford to give it."[86] Representational systems resolve these issues by introducing majoritarian decision-making by proxy. Rather than having every member of a polity personally involved in every aspect of the procedures of policy determination, certain citizens are appointed to represent others within the decision-making process. The question that faces this section is whether the decisions which result from procedures that make this practical concession are able to match direct majoritarianism in its ability to perfectly accommodate the conditions of respect. In order to make this determination, the focus of this discussion will be on the *concept* of representation within majoritarian procedures. There are two prominent conceptions of the role of the political representative within such decisional frameworks, both of which descend from the work of Edmund Burke.[87] In order to determine the potential efficacy of representative democracy in accommodating the conditions of respect, both understandings will be engaged.

In his famous "Speech to the Electors of Bristol", Burke defends what has become known as the "trustee" account of political representation.[88] During the speech, he explains that while it is incumbent on a representative to act on behalf of the interests of the community:

> ...his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. These he

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[86] Wolff, 28.

[87] While it might have been convenient to turn to Waldron's own understanding of this concept, he admits that it is "one of the glaring defects of [his work] is that it does not include an adequate discussion of representation." See *LD* at 110n60.

[88] Thomas Christiano. *The Rule of the Many: Fundamental Issues in Democratic Theory.* Boulder, Colorado: Westview Press, 1996 at 213.

> does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.[89]

In other words, it is the job of trustees to appreciate the desires of their constituents yet determine the appropriate solution themselves; it is their job to *think* on behalf of those they stand in for. It is their job to vote in parliament on the basis of their own considered opinions of what constitutes an appropriate solution given the will of the people, even when that opinion contradicts the overtly stated wishes of the members of the polity. Representation, thus conceived, accepts Mill's division of political intelligence from will, except that instead of the intelligence resting with a special commission, here it rests with the representatives.[90] As such, this conception clearly privileges the views of some members of the polity. By intentionally creating a hierarchy of political influence, this position openly disregards the conditions of respect.

The other conception of democratic representation put forward by Burke is the "delegate" model.[91] Burke describes it as the stance that representatives ought to construe the opinion of their constituents as "*authoritative* instructions; *mandates* issued, which [they are] bound blindly and implicitly to obey, to vote, and to argue for", regardless of their personal convictions on the matter.[92] This model presents representatives as being under a moral obligation to represent the opinions of their constituents, and generally associated with this is a duty to ensure that everyone's

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[89] Burke, Edmund. "To The Electors at Bristol." *The Work of the Right Honourable Edmund Burke*. Henry Rogers ed., London: Samuel Holdsworth, 1842 at 179-180.

[90] It may be more fitting to say that Burke's position set the stage for Mill's distinction, since it was written nearly a hundred years beforehand.

[91] Christiano (1996), 213.

[92] Burke, 180. Original emphasis.

position is taken into account. Because a delegate "does not have the liberty of making adjustments or substituting his or her own judgment for that of the principal", this position evades the problem encountered by the trustee model, in that it implies no privileging of some intelligence(s) over others.[93] However, this approach is not without its own difficulties where respecting the circumstance of disagreement is concerned.

Once again, it is important to note that the conditions of respect demand that the state show consideration for the view of every member of the polity on a particular issue, by insuring that all political perspectives in the polity achieve full expression within the decision-making forum. In a direct democracy, this expression occurs through the medium of the individual whose experiences, values, and understanding of the world, form every nuance of the given view. Herein, every individual can be absolutely assured that the decisions of the state will be made on the basis of a process where their opinions have been perfectly represented.[94] However in a representative democracy a citizen places their views in the mouth of another. It may be possible for the delegate to be sufficiently informed so as to express the political perspective of that constituent flawlessly, especially if the number of people that a representative must stand in for is very low. Yet, it also possible for there to be a mistake on the delegate's part. A representative may misinterpret, confuse, or simply forget aspects of the political viewpoint on behalf of which she is delegated to speak. If such a blunder occurs then an unfortunate constituent has failed to have their view adequately represented. That

[93] Christiano (1996) at 213.

[94] This claim does not take into account potential communicative issues faced at the individual level, such as a fear of public speaking etc.

individual has not been fully enfranchised. Because such mistakes can occur, the concept of delegate representation creates the possibility of a decision which is responsive to a set of political perspectives that inaccurately reflect that of the community. It allows for decisions which breach the conditions of respect in a way that is impossible within a direct democracy.

This problem of inaccurate representation is only exacerbated by the fact that, under normal circumstances, delegates are expected to stand in for the positions of hundreds or thousands of constituents. Under such conditions it is implausible for a delegate to take the time to individually inject every viewpoint they speak for, into the decision-making forum. Instead, the delegate must somehow synthesize the viewpoints of a community into some manageable position or set of positions. In a report to the Parliamentary Research Branch of Canada, Jack Stillborn notes that this issue is further aggravated by the diversity of the modern state. He writes that "while representing the interests of relatively homogeneous groups…is at least an intelligible task" there has yet to be a convincing "account of how individual representatives can serve as credible proxies for highly pluralistic publics, in which there may be no clear consensus on individual issues."[95] Thus the existence of large and diverse polities creates the need for delegates to synthesize the political perspectives in a manner that creates even more opportunities for their representational efficacy to go awry.

[95] Jack Stillman, "The Roles of the Members of Parliament in Canada: Are They Changing?" Library of Parliament, 2002. (June 3, 2006), http://www.parl.gc.ca/information/library/PRBpubs/prb0204-e.htm

In *Law and Disagreement,* Waldron asserts that "a representative's claim to respect is in large measure a function of his constituents' claims to respect; ignoring him, or slighting or discounting his views, is a way of ignoring, slighting or discounting *them.*"[96] However, this discussion has revealed that such a conclusion is not warranted. In terms of the trustee model, the primacy allotted to the judgments of the representative is in open opposition to the equal respect due every member of the polity as demanded by the circumstance of disagreement. Conversely, the delegate model cannot guarantee the equal representation of every individual's political perspective, as would a direct democracy. Although not normatively opposed to the conditions of respect, the delegate model creates the procedural possibility of a failure to accommodate them, in the decisions of which it is a part. Thus, even in the abstract, democratic representatives are open to criticism that does not impugn their constituents. Representatives, and representational majoritarianism, can be slighted for the ways in which they create a deficit in a state's ability to show consideration for the conditions of respect.

2.2.3 Democratic Representation: In Practice

The above discussion has revealed that, at best, representative decision-making procedures can achieve respectful legislation in spite of the potential for error; potential which grows exponentially when this method is placed into the context of the modern pluralistic state. Thus, there is already an evident disparity between the dignity of

[96] *LD* at 109. Original emphasis.

legislation issuing from a representative government and that of a direct democracy, where there is no chance of such a failure. However, because Waldron uses his conclusions concerning the dignity of majoritarian legislation to argue against the adoption of Charters in modern states, his endorsement of such legislation appears to extend to that legislation which issues from *current instantiations* of representative democracy. Attendant to such institutions are a number of generally adopted, yet contingent, procedural features. This section will investigate only one such facet of modern democratic representation. In order to determine the relative ability of modern representative legislatures to accommodate Waldron's conditions of respect, the notion of party politics will be investigated.

The rise of the political party is often associated with a disillusionment concerning the efficacy of conventional representation. Theorists like Hans Kelsen have argued that:

> ...*it is not possible* for all individuals who are compelled and ruled by the norms of the state to participate in their creation, which is the necessary form of exercise and power; this is so evident that the democratic ideologists most often do not suspect what abyss they conceal when they make the two 'people' one.[97]

On this basis Kelsen and other theorists, have contended that rather than relying on the abilities of a representative to effectively synthesize the political views of the public, or make the proper decisions on their behalf, members of a polity are better served in their attempts to influence state policy, if their representatives are affiliated with particular political positions. As such, within party-politics, representatives are understood to be

[97] Hans Kelsen. *La Democratie. Sa Nature-Sa Valeur*. Paris : Economica, 1929 at 27, in Przeworski at 8. My emphasis.

members of organizations dedicated to promoting a particular political perspective. These organizations "put out position papers, their officials give speeches, and they organize conventions and sponsor think tanks…And all of these activities have the purpose of persuading ordinary citizens to adopt or retain certain positions on matters of political concern."[98] The modern majoritarian state has embraced this notion to the extent that there has been a "virtual disappearance of MP's who are not affiliated with any party."[99] As such, when the citizens of the modern democracy elect legislative candidates they effectively sanction a comprehensive political position. Herein, "*the people decide issues* through the election of individuals," rather than electing officials to decide the issues.[100] In this way the emergence of the political party has actually signalled the inversion of the conventional notion of representation. "Members of Parliament now represent party positions to the electorate rather than riding positions to the Government."[101]

Despite its prevalence, this move away from conventional representation does not necessarily accord with Waldron's conditions of respect. As Thomas Christiano observes, "an electoral system that focuses on parties, and systems of representation that have parties representing citizens, does economize on the cognitive tasks of citizens."[102] Rather than being asked to provide their own opinions on a topic, members of a polity are

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[98] Christiano (1996), 246.

[99] Stillman.

[100] Joseph A. Schumpeter. *Capitalism, Socialism, and Democracy.* New York: Harper and Brothers, 1942 at 250.

[101] Stillman.

[102] Christiano (1996), 223.

only required to choose between the political programs of different parties.[103] Thus, instead of being a decision-making procedure that necessarily *enfranchises* the positions of everyone, party politics appears to privilege a select few political perspectives and positions, and asks the citizenry to use their legislative influence by *endorsing* one partisan position over others, *and* over any unrepresented perspectives. In this light, the orientation of the decision-making procedures of the modern majoritarian state seem at odds with Waldron's conditions of respect.

However, it may be argued that modern democratic decision-making is not insensitive to the demands of the public. For, it is the party that best approximates the opinions of the most members of a polity that will find its representatives being elected. This is a strong point. But it is still unclear whether such parties pay any attention to political perspectives that do not have a substantial enough following to affect the outcome of an election, let alone whether they insure that such positions are allotted their share of decisional force within the policy determinations of the state. Indeed, unlike the delegate model, where the representative understands himself to be under an obligation to fairly represent the views of the entire community, there is no similar norm at play in the partisan world of party politics. Parties are not bound to appreciate the plurality of opinions that are present within a state, and they are generally argued for on the basis that they will not. Although political parties succeed only insomuch as they are able to garner public support, this is certainly no assurance that they are thereby enfranchising every political position, or that they are even attempting to do so.

[103] A party's program is the list of positions and principles that it supports, and that its elected representatives will vote in accordance with.

Moreover, much like the delegate model, party politics is subject to representative failure. Where parties provide competing comprehensive platforms the reasonable voter will likely endorse that perspective which *most* accurately reflects their own positions.[104] Given the variety and nuances of the individual political perspectives at play in the modern state, it is safe to assume that in most cases a party's platform will not be perfectly in accord with the opinions of a particular constituent. Instead of endorsing the perspective which is a perfect match for their own, constituents endorse the party whose platform has the most positions and principles in accord with their own views.[105] Given this state of affairs, it is conceivable that a party could be elected without some of its positions having the support of the majority of citizens in a state. In *Law and Disagreement,* Waldron actually provides an example of such an event. He notes that:

> In 1972, the Conservative government in Britain passed a statute – the Housing (Finance) Act – requiring local authorities to raise public housing rents to market rates…In 1973, the opposition Labour party pledged not only to repeal the measure but remove all penalties [that had been levied in accord with the act.].[106]

In 1974 the Labour party was elected, due in large part to the public outrage concerning the actions of the Conservative party; actions which were the result of a decision-making procedure that failed to determine a policy in accord with the will of the majority, and thus with the conditions of respect.

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[104] I use the term "reasonable voter" to distinguish between those individuals who participate in good faith, and those who, for whatever reason, do not. An example of the latter would be an individual who is thoroughly disenchanted with their political plight and chooses to participate randomly in order to denigrate the decision-making process.

[105] They might, however, endorse a position that is not quantitatively the most representative, if there are qualitative issues that are overriding.

[106] *LD* at 100.

So, although party politics may cater to the opinions of the majority of voters, there is no demand that they incorporate every political perspective existing in their constituency. Moreover, akin to the delegate position, this form of representation inherently creates a risk of inaccurately appreciating the majority position on particular political issues. As such, in the decisions of the contemporary majoritarian state every position need not be taken into consideration and given its due influence. Thus the dignity of the legislation which Waldron endorses in his arguments against Charters of rights appears to be significantly less than that which issues from direct democracy, where every position is always both enfranchised and provided equal decisional weight, thereby guaranteeing results in accord with the majority principle. Parties, and party politics, can be criticized, along with the trustee and delegate models of representation, for this diminished dignity.

2.3 Conclusion

This chapter began with an explication of Waldron's arguments concerning the political shortcomings of Charters of Rights and the dignity of modern democratic legislation, both of which are argued for on the basis of conditions of respect derived from the circumstance of disagreement. It was then noted that these conclusions are reached on the basis of an idealistic conception of modern democratic legislation. By comparing the concept of political representation and its modern instantiations with the direct democracy through which Waldron argued for the dignity of legislation, it has

become obvious that neither conceptual representational majoritarianism nor modern examples of democratic decision-making are able to match the ideal standard upon which Waldron based his conclusions.

More specifically, looking back it appears that these different conceptions of majoritarianism achieve varying degrees of respectful governance. The trustee model of representation inherently privileges the judgments of the representative over that of the constituency, thereby flouting the condition of enfranchisement. On the other hand, modern majoritarian politics, based on the use of political parties, while not *inherently* privileging any particular view, inverts the traditional representative relationship. By having its parties and their representatives present the virtues of particular political perspectives to the community for approval, this manner of decision-making cannot be confidently claimed to always enfranchise or give equal influence to every political perspective. Indeed, it is not normatively disposed to do so. Finally, the delegate model does imply that a representative will at least attempt to enfranchise every political perspective. Yet, even here there is a possibility of representative failure and with it the potential for a breakdown in decisional responsiveness. Given this understanding, contemporary democratic legislation ought not to be seen as the unimpeachably dignified process that Waldron portrays. In fact, it is clear that the party politics integrated into the majoritarian decision-making procedures of modern states are not the optimal *representative* arrangement for respecting the circumstances of disagreement.

Yet, this project set out to determine the perspicacity of Waldron's arguments against the compatibility of Charters with majoritarian decision-making systems. While

the appreciation of the representational hierarchy illuminated by the previous discussion does illustrate the insufficiency of Waldron's conclusions concerning the overall political primacy of modern democratic politics, his opinion on the status of Charters does not appear to be threatened. As long as Charters are seen to inherently place substantive restrictions on political decisions, and thereby privilege certain political perspectives over others, it would seem that they cannot hope to sufficiently accommodate the conditions of respect. However, this may not be the case.

The next chapter will turn to a theory of the nature and role of Charters of Rights that seeks to redefine such mechanisms in terms that are more obviously in accord with the demands of Waldron's circumstance of disagreement. This new conception of Charters will then be investigated to determine whether it might actually match, or perhaps even surpass party politics, in its ability to accommodate the conditions of respect.

CHAPTER 3: A Better Face for Charters?

Early in the previous chapter it was noted that Waldron, through the use of the conditions of respect, argued that the inclusion of a Charter of Rights among a state's decision-making mechanisms infringes on the dignity of the legislation which issues from such procedures. However, recent contributions by authors such as Kent Roach, David Strauss and Wilfrid Waluchow (among others) have sought to undermine that conclusion. Much of the attention of these scholars has been focused on examining the common assumptions concerning the role and nature of a Charter of Rights. This chapter will focus upon the work of Waluchow, who argues for an "alternative understanding of a Charter according to which neither its coherence nor its legitimacy is undermined by the existence of Waldron's 'circumstances of politics'..."[107] If Waluchow's assertions are to be persuasive, given Waldron's normative matrix, then his conception of Charters must ensure that a polity's decisions honor the conditions of respect at least to the same extent as majoritarian party politics. Thus, a comparison of the relative efficacy of these two decision-making procedures, in accommodating the conditions of respect, will be used to determine whether this new conception of Charters can successfully take advantage of Waldron's idealistic argument for the primacy of unfettered modern democratic legislation.

3.1 The Standard Conception of Charters

[107] *CLT* at 316.

Before embarking on an explanation of Waluchow's conception of Charters, it is worth appreciating, in slightly more detail, the *prevailing* understanding of this constitutional feature. When describing Waldron's arguments, in the second chapter, the concept of a Charter was associated with the constitutional entrenchment of particular rights of political morality; one of the function's of which is to act as a normative restraint upon the spectrum of valid legislation which may be enacted by a state.[108] This is a simple definition of what Waluchow refers to as the "fixed" or "standard" conception of Charters of Rights. Such a conception presents these constitutionally embedded rights as designating certain stable and discernable principles of political morality, which a community has committed itself to observe in all of its decision-making.[109] These principles are fixed; their content is not susceptible to change. By requiring a community's current and future determinations of policy to conform to such norms, Charters are supposed to ensure decisions that are, morally speaking, the "right answer" to any given question of social policy.[110] Such a conception is associated with the claims that:

> We know **which** moral rights count, **why** they count, and **the many complex ways** they count in the myriad circumstances of politics. Furthermore, we agree to

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[108] Charters may also constrain government action in areas other than the creation of legislation. However, it is the relation of such mechanisms to a polity's procedures of policy determination that Waldron is primarily concerned with.

[109] The term "discernable" is used, because the content of Charter rights is often understood to be a matter of interpretation rather than sheer textual meaning.

[110] Kent Roach. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue.* Toronto: Irwin Law Inc., 2001 at 225. The need for such institutions is commonly argued for on the basis that circumstances may arise which guide a polity's dominant political perspective to be determined by prejudice, fear, or sheer self-interest. It is contended that such influences may lead to immoral decisions unless the policy determinations of the community are preemptively constrained.

> tie ourselves and future generations of citizens and legislators to the mast of these commitments.[111]

Again, the problem associated with a constitutional device of this nature, with which Waldron is predominantly concerned, is that there is no assurance that the identified moral commitments will always accurately represent the views held by the community. In granting enduring substantive ascendancy to a certain set of moral values, a polity courts the possibility that the validity of its decisions would be determined in a manner that does not provide equal influence to every political position in the community. On this basis, Waluchow acknowledges that if the standard conception of Charters is accepted "then there is no doubt that the Critics (such as Waldron) will eventually win the day".[112]

3.2 Considered Opinions and Common Law Methodology: Waluchow on Charters

With the standard conception of Charters and its inherent disregard for the conditions of respect firmly in mind, it is now time to turn to the alternate conception put forth by Waluchow. Three features of his project must be explored in order to best appreciate his conception of this constitutional mechanism and how it respects the circumstance of disagreement. The first aspect of Waluchow's position to be discussed is his understanding of the nature of representation. The second feature to be discussed is his understanding of the role of Charters in relation to community decision-making. The

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[111] *CLT* at 420. Original emphasis.
[112] *CLT* at 218.

third and final element is how Waluchow conceives of the nature of the norms to which Charters make reference.

3.2.1 Responsible Representation

It has already been argued that Waldron romanticizes contemporary representative majoritarian decision-processes by arguing for them as though the respect they deserve is comparable to that warranted by direct democracy. Waluchow contends that this is not the only idealization at play in Waldron's arguments against Charters. In arguing for the dignity of modern legislation and for the indignity of Charters, Waldron asserts that most advocates portray the views of the public as often being "wrong-headed or ill-motivated".[113] He claims that they espouse a "a predatory view of human nature and of what people will do to one another when let loose in the arena of democratic politics".[114] To contradict this trend, Waldron would have his readers conceive of each member of the polity as being a responsible decision-maker; as having the "ability to deliberate morally and to transcend a preoccupation with [their] own particular or sectional interests."[115] In a paragraph where he directly addresses political philosophers, Waldron claims that:

> ...when we come across a citizen or party of citizens holding a view about rights that differs from our own, we should think of that along the lines that we think of a colleague's contrary conception: something to be disagreed with but respected,

[113] *LD* at 222.
[114] Ibid.
[115] Ibid. at 221.

> treated as a good faith contribution to a debate in which nothing at all is self evident.[116]

While certainly not endorsing a 'predatory view' of humanity, Waluchow disagrees with this manner of portraying every opinion of the members of a polity. In *A Common Law Theory of Judicial Review,* he grants that while it may be inappropriate to reject the expressed views of the community as arising from self-interest or moral corruption, there are other acceptable grounds for calling political opinions into question. First, an expressed opinion ought to be accepted only if it accurately reflects the intentions of a citizen. After all, it is possible for the views of a member of the polity to be misspoken or in other ways misrepresented during a decision-making process.[117] Second, an opinion must be "based on adequate knowledge and understanding" of the relevant facts that might influence the agent's given perspective.[118] This "epistemic condition" is meant to discourage ignorantly arrived at positions from being given political sway.[119] Third, and most controversially, an individual's expressed opinion ought to be "consistent with [one's] basic beliefs, values, commitments and settled preferences".[120] Waluchow refers to this as "the evaluative dissonance condition", in that it is intended to encourage political opinions that are completely thought through; that are

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[116] Ibid at 229-230.

[117] Such an issue is well illustrated by the problem of 'hanging chads' in voting proceedings. A recent example is the 1996 Democratic primary in Massachusetts, where the state Supreme Court examined over 900 disputed ballots and declared the winner by ruling that ballots which were merely dimpled would count. See Brooks Jackson. "'Hanging Chads' Often Viewed by Courts as Sign of Voter Intent." CNN. (July 16, 2006) http://archives.cnn.com/2000/ALLPOLITICS/stories /11/16/recount.chads/

[118] *CLT* at 156. Waluchow does not attach any particular standard for what "adequate" knowledge amounts to. Rather it is best understood as demanding that citizens adhere to their own criteria for being acceptably informed.

[119] Ibid.

[120] Ibid. at 157.

not simply "knee-jerk" reactions to whatever political issue is in question.[121] Together these three conditions amount to the standard for a member of a polity to express a *responsible* political opinion. Contra Waldron, Waluchow is willing to accept that such conditions are open to violation when members of a polity are engaged in political decision-making. Acknowledging these failings does not amount to adopting a "generalized contempt for the ordinary citizen", rather it is a bow in the direction of practical political theorizing.[122]

On the basis of these considerations, Waluchow argues for a particular manner of representation. He contends that rather than simply being a proxy for every opinion expressed in a community's decision-making procedure, majoritarian representatives are obligated to exercise judgment in determining the authenticity of the views put forward by their constituents. Although this sounds vaguely like the trustee model it does not involve original contributions on the part of the representative. In a case where a citizen's current viewpoint is considered to be insincere the representative must turn to the relevant sincere positions previously expressed by the constituent. Thus, "a representative's role can sometimes require overriding one set of expressed wishes – inauthentic ones – for the sake of honoring other expressed wishes, the genuine ones."[123] In this way Waluchow has modified the delegate model of representation by demanding that it be able to account for the practical reality of irresponsibly proffered opinions. This emphasis of yet another utopian gloss by Waldron, and the resultant argument for

[121] Ibid. at 157, 437.
[122] *LD* at 230-231.
[123] *CLT* at 169.

adapting pertinent representative procedures are used by Waluchow to set the stage for his position on the role and nature of Charters of Rights.

3.2.2 The Role of Charters of Rights: Enforcing Equilibrium

Waluchow's conception of Charters is most particularly influenced by the problem of evaluative dissonance. In discussing this criterion of responsible decision-making, he notes that as moral agents, people typically strive:

> ...to achieve something like what Rawls calls a 'reflective equilibrium', where our principles, rules, values and maxims are internally consistent with one another, based on true beliefs and valid inferences, and in harmony with our "considered judgments" about particular cases and types of cases.[124]

Thus, were a representative to reject a citizen's proffered opinion on the (accurate) basis that it was out of accord with that constituent's accepted moral framework, it could plausibly be argued that the representative was in fact supporting the moral intentions and commitments of the citizen, thereby *more accurately* representing her than had her irresponsible opinion been given political influence. This argument is the platform on which Waluchow's conception of a Charter's role *in constraining legislation* is based.[125]

He asserts that just as an individual member of a polity can act out of accord with their own fundamental beliefs and convictions, so too can a community make policy

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[124] Ibid. at 384.

[125] It must be noted that Waluchow does not view the role of Charters to be limited to restraining the valid scope of community decisions or even government actions more generally. He argues passionately for the symbolic value of Charters; that they "help define and reinforce the character of the nation as one **publicly committed**, in its legal and moral practices, to the fundamental rights and values it includes" in *CLT* at 417. Original emphasis. While this is a powerful argument, it does not seem to bear on the discussion of how well Charter's can accommodate Waldron's conditions of respect.

determinations that fail to be in harmony with its *currently* held moral commitments. And why, if it makes sense to deny political influence to the irresponsible opinions of a single member of a polity on this basis, "should we not include conformity with the true commitments of our community's constitutional morality among our conditions for legal validity?"[126] After all, if a judge, enforcing a Charter right by overruling duly passed legislation, is acting to ensure the integrity of a community's accepted moral framework, then she (dependant upon the accuracy of her assessment of the community's views and the nature of the legislation):

> ...might actually be **enforcing**, not **thwarting**, the community's very own political morality! Just as a person might come to discover, when she applies the test of reflective equilibrium, that some of her moral opinions conflict with general moral principles to which she is otherwise committed and which she is unwilling to relinquish, judges might be led to discover that the community's or the legislature's moral opinion on some issue - e.g. same sex unions or the rights of inmates to vote in elections - conflicts with its very own principles of political morality, and by implication other judgments of the community in analogous cases - e.g. those involving racial discrimination.[127]

When comprehended in this manner, Charters are not seen to limit legislation on the basis of the right moral answers per se. Instead they invalidate legislation that was not sufficiently critically examined. In this manner they encourage community decisions that are in accord with the moral commitments currently dominant in a polity. Thus, rather than enforcing moral truths, Waluchow holds that Charters can help to ensure that the decisions of a state are responsive to the considered political perspectives of its citizens. Charters, thus conceived, embrace a much more deferential attitude towards the opinions of the polity, than that presupposed by the standard conception.

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[126] Ibid. at 393.
[127] Ibid. at 394.

3.2.3 The Nature of Charter Rights: Responsive Norms

Prima facie, this new conception appears to be less at odds with Waldron's conditions of respect than the standard model. By substantively privileging only those moral principles that are in accord with the current commitments of a community, Waluchow is able to portray Charters as contributing to democratic governance. However, as long as entrenched Charter's are understood to consist of *static* rights of political morality it is difficult to see how they could maintain this respectful role for long. As Waluchow acknowledges:

> ...the fact remains that true self-government seems to require an ability, on an ongoing basis, to change one's mind. At the very least, it requires an ability to alter one's commitments in light of new beliefs, changing circumstances, and unforeseen occurrences.[128]

Thus, for Waluchow's conception of Charters to be plausibly understood as a member of the nexus of institutions which can continuously support respectful decision-making procedures, the rights which are embodied in it must be open to revision in a manner that is able to respond to changing views within a community.[129] According to Waluchow, this demand is capable of being met.

To make this point, Waluchow refers the reader to the fact that:

> A Charter's provisions are expressed using very abstract terminology whose understanding and application requires appeal to contentious norms of political

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[128] Ibid at 374

[129] Waldron seems to accept this responsiveness to changing community views as an acceptable manner in which such mechanisms might better accommodate his conditions of respect. He notes that "constitutional constraint is less unreasonable as precommitment, the greater the opportunity for altering it..." See *LD* at 275.

> morality. Typical examples of such terminology include 'equality,' 'fundamental justice,' 'due process,' 'free and democratic,' and 'the rule of law'.[130]

In other words, the language of Charters is generally open-textured; its *exact* referent is indeterminate.[131] Waluchow asserts that this "abstractness, can be put to use deliberately", by allowing the rights of a Charter to be interpreted in accord with a community's current moral commitments.[132] Such an interpretation would act as a precedent; a provisional ruling concerning the nature of the right that, though official, can be overturned should the community's moral understanding of the given right change.[133]

Abstract language and the notion of legal precedent, though contributing factors in creating a democratically responsive Charter, are not themselves sufficient to guarantee that its rights actually conform to the moral inclinations of a community. To ensure that such rights reflect the deep-seated views of the current members of a polity, Waluchow suggests that they should be informed by the "constitutional morality" of that community.[134] A polity's constitutional morality consists of:

> ...the set of moral norms and considered judgements, properly attributable to the community as a whole as representing its true commitments, but with this additional property: *they are in some way tied to its constitutional law and practices*...It consists of the moral norms and convictions to which the community, via its various social forms and practices, has committed itself, and which have in some way or other been drawn into the law...It is the morality

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[130] *CLT* at 371.

[131] The term "open-textured" comes from Hart. See *The Concept of Law* at Ch. 7.

[132] *CLT* at 339. Waluchow provides an example of this phenomenon when he notes that in the United States, the constitutional "understanding of 'moral equality' for instance, has clearly changed in such a way that the 'separate but equal' treatment, which was at one time in the racial history of the United States thought perfectly consistent with that value, are now generally agreed not to be so" (Ibid at 366).

[133] That such a manner of interpreting Charter rights "is analogous to the development of concepts like 'negligent', 'reasonable', and 'forseeable' in tort law", is why Waluchow regards his understanding of Charters as a "common-law theory". See *CLT* at 363.

[134] Ibid at 378.

> actually imbedded in social and legal practices in the way in which principles of corrective justice are imbedded in our tort law.[135]

It is by drawing "support for its judgment from prior legal decisions and from legal doctrines and traditions", that a nation's courts would be able to derive the content of particular Charter rights by referring to an array of relevant community decisions which themselves demonstrate reflective equilibrium.[136] Under this conception, the content of Charter rights is determined by the previous political conduct of a community. Should a state's political behaviour change dramatically, then so too would the content of the Charter of Rights. In this manner, Waluchow has demonstrated that Charter rights need not be conceived of as fixed points of pre-commitment, rather it is possible to conceive of them as being responsive to the changing moral positions of a community.

So Waluchow has presented Charters as a constitutional mechanism which attempts to ensure that only legislation which is responsibly decided upon be given political sway in a state. Herein, responsible decisions are those that conform to the deep-seated moral commitments of a community, as identified by the history of political conduct within that society. In this way, Waluchow has sought to avoid the "insult to democracy and moral autonomy represented by Charter review and the Standard Case offered in its support."[137]

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[135] Ibid. at 388-89. My emphasis. This bit of vagueness will be explored in greater depth in the next section.

[136] Ibid. at 98. Moreover, Waluchow contends that through careful reflection an existing reflective equilibrium between "relevant norms, convictions, and judgments about particular cases, widely accepted informally within the community and/or formally within their legal judgments in constitutional cases" may actually reveal points of consensus in a community that defy Waldron's claims concerning the ubiquity of political disagreement (Ibid. at 390).

[137] Ibid. at 425.

3.3 On The Scales of Respect

By characterizing the substantive limits placed upon the scope of possible legislation by Charters as being a function of the community's existent moral convictions, Waluchow is able to contend that such mechanisms are "not the threat to democratic self-government that Waldron and many others claim" them to be.[138] While this conception is able to cast Charters in a more democratic light, it has yet to be determined just how well such constitutional devices are able to honour Waldron's conditions of respect. If Charters, so understood, are able to maintain or improve upon the respect due the legislation which issues from majoritarian decision-making processes structured around political parties, then Waluchow's claim that they are not hindered by the circumstances of politics will be demonstrated to be true. The remainder of this chapter will be devoted to investigating whether the new face which Waluchow creates for Charters is able to attain this end.

3.3.1 A Necessary Improvement?

The first thing to resolve, when exploring the ability of Waluchow's conception of Charters to accommodate the conditions of respect, is whether the mere introduction of such a constitutional mechanism into a polity's decision-making procedures inherently enhances the dignity of the legislation which issues there from.

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[138] Ibid. at 375.

To make this determination it is helpful to return to a claim that Waluchow has already been noted as making in regard to the constitutional morality of a community. He states that the constitutional norms which inform the content of Charter rights must be "*in some way tied to [the] constitutional law and practices*" of a polity.[139] Though somewhat vague, this statement seems to indicate that the norms which make up a nation's constitutional morality are not derived directly from the opinions of the constituency. Rather they are appreciated through the medium of the legal, or perhaps more appropriately, the political conduct of a state.[140] Instead of determining the convictions of the community through speaking or polling individual members, Charter adjudication would identify such norms indirectly, as those "endorsed by the law in legislation and precedent."[141] By being responsive to the will of the people in this way, Charters can be understood as a secondary or second tier majoritarian device.[142] They are contrasted with primary or first tier reference devices, such as parliamentary politics or, in some cases, judicial rulings; mechanisms that look straight to the opinions and therein the political perspectives of the members of a polity.[143]

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[139] Ibid. at 388.

[140] I say "more appropriately" because some constitutional practice is non-legal; it is convention based. The norms of such conventional practice do not possess formal recognition in the law of the state, but the officials of a state still understand them to be behaviorally binding.

[141] Ibid. at 379.

[142] It is worth noting that Waluchow also mentions that "social practice(s)" could serve as a source of identifying a state's constitutional morality (Ibid. at 390). On this basis he might well be envisioning Charter norms as being informed directly by the views of the public. Unfortunately, the manner of identifying and referencing the relevant practices is never developed. As such, this discussion will treat the relevance of such sources as subsidiary to norms already embedded in the political practices of the state, since his treatment of these latter sources is more comprehensive.

[143] It may seem surprising to claim that judicial rulings count as a first tier mechanism of political responsiveness. However as Melvin Eisenberg notes, social propositions such as the opinion of the community often play a role in the decisions of the courts. As an example, he cites "the extent to which actions that are perceived by the community as inflicting wrongful injuries should give rise to remedies at

This manner of once-removed responsiveness to the political views of citizens makes a Charter's ability to help ensure that a state's actions are in accord with the will of the people contingent upon the accuracy of the first tier mechanisms. If a state's existent body of legislation, law, and political convention has been inaccurately arrived at by primary devices, then when a Charter identifies a coherent normative complex within *that* assortment of constitutional norms, and overrides a state decision, on the basis that it would disrupt the reflective equilibrium of that normative matrix, it would be enforcing consistency with a morality that does not reflect the de facto convictions of the community. As such, the responsive efficacy of a Charter's determinations is a function of the efficacy of the first tier mechanisms that create the sources used to identify a state's moral complex. A Charter's ability to contribute to responsible legislation is conditional; it requires the existence of generally effective mechanisms of primary representation. Thus, the introduction of a Charter, as Waluchow conceives it, does not entail a necessary enhancement in the ability of a community to completely enfranchise or provide equal influence to every political perspective therein.

It might be thought that this conclusion is too hasty. For, although Charters do not overtly appear to represent a necessary improvement in the representative efficacy of a state, they may inherently improve the results from particular first-tier devices, such as majoritarian party-politics. After all, due to the fact that Charters and Bills of Rights are often ascribed the power to overrule the determinations of such primary representative institutions, the very existence of a Charter would likely encourage primary mechanisms

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law" in tort cases. See *The Nature of the Common Law*. Cambridge, Massachusetts: Harvard University Press, 1988 at 15.

to consider how the political decisions which issue from them relate to the moral matrix of the state.[144] There are two problems with this line of thinking. First, while a Charter *may* encourage such review procedures, it need not. It is plausible that there be an acknowledged division of labour within a state, where the legislature understands its role to be representing the immediate wishes of the community, leaving the moral implications of such determinations to be ascertained and adjudicated by the courts within a process of Charter review. Second, and as noted previously, because Charters are a second-tier representative mechanism, there is no guarantee that the normative framework which it enforces is identical with that of the community. Thus, it is conceivable that a Charter would inspire a legislature to review its policy proposals in light of a moral complex that does not reflect that held by the community. Hence the adoption of a Waluchow-ian Charter, by a state, does not necessarily entail that first-tier representative mechanisms, or the decision-making process more broadly, will produce legislation or other political decisions that are more respectful than had it not been included within a nation's constitution.

3.3.2 An Inherent Conflict?

[144] This deference to Charter principles is exemplified in "Charter-Proofing" activities routinely practiced by nations which have adopted such constitutional mechanisms. In Canada, for example, "the Clerk of the Privy Council instituted the Cabinet Support System, with the support of the Department of Justice. The System requires all Memoranda to Cabinet (MCs) to include an analysis of the Charter and other constitutional implications of any policy or program proposal." See Privy Council. "Particular Legal and Policy Considerations" *Guide to Making Federal Acts and Regulations.* Ottawa: Office of the Privy Council, 2001 at http://www.pco- bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=legislation/lmgchapter2 .2d_e.htm

So far it has been argued that Waluchow's conception of Charters does not necessarily enhance the respect due a community's political decisions. However, this point does not mean that Waldron's argument towards the indignity of Charters is successful. At this point in the discussion, it would seem that, at worst, any disrespect created by Charters is merely a function of the disrespect displayed by the first-tier representative mechanisms. On this basis it would be difficult to argue that the constitutional inclusion of a Charter in any way increases the disrespect due to decisions which issue from a community's manner of policy determination. However, the investigation of the respectful nature of Waluchow's conception of Charters is not yet complete. This section will investigate the possibility that Charters might inherently include a representative failing that is unrelated to the strength or weakness of a state's primary devices.

In section 3.2.2 it was stated that Waluchow contends that being a moral actor requires "a settled wish never to allow temporary, far less worthy preferences to override [one's] fundamental moral commitments".[145] It requires that the decisions of an agent be *responsible*. This is, as previously noted, the primary basis through which Waluchow argues for the inclusion of Charters among a polity's decision-making mechanisms; they help ensure that a community acts only on the basis of responsible moral decisions. This argument appears to mark a point of divergence between the principles which guide Waluchow and those that motivate Waldron's position. In contending for this moral role of Charters, Waluchow seems to be looking beyond Waldron's normative matrix of

[145] Ibid. at 158.

ubiquitous disagreement combined with the principles of equality and fairness. He appears to be promoting the inclusion of the principle of moral integrity into this normative complex, and thereby into the formative influences which shape a state's manner of policy determination. Where Waldron's matrix demands only that all political perspectives be enfranchised and given equal influence in the decisions of the state, Waluchow's schema adds the condition that any political decision must be seen to be responsible in light of the moral framework of the community. So when Waluchow claims that the legitimacy of Charters is not undermined by Waldron's circumstances of politics, he can be read as arguing that the principle of moral integrity does not make any structural demands upon a nation's decision-making procedures that would compromise its ability to honor the demands of equality and fairness. But is this correct?

In order to enforce the moral integrity of a community, Charter adjudication faces a very difficult problem. It must be able to identify the normative framework of a second party that cannot always be trusted to accurately appreciate or portray its own moral positions.[146] This means that Charter adjudication must be able to ascertain the current moral framework of the community *externally*; that is, without the benefit of firsthand knowledge of the relevant norms. It is in response to this problem that Waluchow asserts that the moral convictions of a community ought to be identified through an investigation of the history of its political conduct.[147] Ultimately this historical approach to identifying

[146] Such deviant behavior does not just arise from ignorance. As Waluchow notes, "prejudice and rampant fear which sometimes grip communities in the face of perceived threats to their security" can cause them to knowingly violate their own moral principles (Ibid. at 158).

[147] Even given this strategy, Waluchow notes that "it is admittedly very difficult in some instances to distinguish between true evaluative dissonance, on the one hand, and genuine changes of heart on the other" (Ibid. at 154). Indeed, because Waluchow's re-conception of Charters is probative in nature, this is

constitutional rights, allows Waluchow to portray Charter adjudication as being able to contribute to ensuring *responsible* decisions by quashing any legislation or other political determinations that appear to be "out of character" for the polity, thereby satisfying the demands of moral integrity.[148]

However, this procedural mechanism places Waluchow's conception of Charters into obvious tension with the demands of equality and fairness in political decision making. By identifying a community's morality through the "prior legal decisions and from legal doctrines and traditions" of a state, Waluchow's conception privileges the content of moral attitudes exhibited in a people's recent moral behaviour, over their currently expressed positions, within the policy determinations of the state.[149] To best appreciate how this is at odds with the sheer demands of fairness and equity, consider how a decision-making procedure, which incorporates such a Charter, would accommodate a paradigm shift in a polity's moral framework. Suppose that a community were to undergo a radical but genuine change in its moral attitudes, to such an extent that its new moral outlook fails to reach reflective equilibrium with its recently, but no longer, held convictions. Under Waluchow's conception of Charters, the first time that such authentic moral attitudes were reflected in the political determinations of the community, such behaviour would appear to be anomalous, and therefore in violation of the constitutional rights of that polity. On this basis, it would appear that the courts within such a system would be obligated to reject such a decisional outcome. Thus, it can be

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one of a number of issues that he acknowledges as needing more thorough treatment than he was able to provide in his work thus far.

[148] Ibid at 3-38

[149] Ibid at 398. That there can be significant overlap between the content of these two subjects does not detract from the conceptual distinction.

seen that defining Charter rights through the history of a nation's political conduct imposes upon the ability of a decision-making mechanism to identify the views *currently* held by the members of a polity, even those that are fully considered and authentically held. This is not to say that it would be impossible for a shift in attitudes to *eventually* gain recognition within a state that incorporates such a constitutional mechanism. Waluchow's conception of Charters does seem able to acknowledge a continued pattern of such political activities and eventually modify the understood content of constitutional rights to accommodate the new behavioral input; it does "allow for incremental changes" to the moral schema of a community.[150] However, the principles of fairness and equality demand more than an ability to acknowledge changes in a community's moral attitudes in this lagging manner. They demand that the decision-making procedures adopted by a community provide decisional weight to the fact that its members *currently hold* a certain view.[151] Thus, Waluchow's conception of Charters trades one problem of responsiveness for another. By accommodating the demands of moral integrity, in trying to ensure that a state's decision-making procedures do not allow for decisions made on the basis of evaluative dissonance, Charters hinder a community's ability to achieve decisions are responsive to the current political views of the community. This point does not deny that, given effective first-tier representative mechanisms, Charters could potentially constrain irresponsible political decisions and actions. Rather, it demands recognition of the fact that the ability to contribute to the moral integrity of the political action of the state comes at the expense of the demands of equality and fairness. From this perspective,

[150] Ibid. at 403.
[151] *LD* at 113.

Waluchow's conception of Charter adjudication seems to include procedures that are incongruous with the demands of Waldron's conditions of respect.

3.3.3 A Comparison of Dignity

In the second chapter it was noted that Waldron's arguments left the primacy of modern parliamentary democracy open to being matched or even trumped by any decision-making process that could as, or more effectively honor the conditions of respect. It is now time to discern whether Waluchow's conception of Charters is up to this task.

Modern parliamentary party-politics is a first-tier representative mechanism. It is not dependent upon any other procedures in determining the decisions which are made through it; left unfettered, it has total control over the decisional outputs of a community. On one hand, this manner of representation does not automatically privilege any particular political position. Yet on the other, its adoption does not guarantee that there will be an attempt to represent the views of every member of the polity. So, while party-politics is not procedurally or conceptually opposed to honouring the conditions of respect, neither is it oriented towards ensuring their fulfilment. Consequently, although the legislation which issues from such a mechanism may well be in accord with the conditions of respect, there is at least as strong a possibility that it would not be.

By comparison, Waluchow's conception of a Charter portrays this device as a second-tier representative mechanism. It is dependent upon other procedures if it is to

contribute to the creation of respectful political decisions. As such, it is akin to party politics in that the mere inclusion of this constitutional mechanism within a community's manner of decision-making processes cannot, in any case, guarantee the dignity of the resulting legislation. Yet, unlike party-politics, such a Charter *is* normatively oriented towards satisfying conditions of respect. However, it is normatively oriented towards an enriched version of these conditions endorsed by Waluchow; a conception that invokes the principle of moral integrity. On the basis of this enriched value set, Waluchow's conception of Charters involves decision-making procedures that are clearly at odds with the demands of Waldron's normative position. For, although a Charter, thus understood, honours no political position purely on the basis of its content, such a device does imply the procedural privileging of the recent *historical* moral convictions of a community, rather than those *currently* held by its members. Thus, the normative bearing of a Charter, as conceived by Waluchow, is found to be oriented disparately from that which Waldron endorses for a political decision-making institution. Moreover, on the basis of this deviant normative orientation this conception of Charters calls for procedures that are in conflict with the demands of Waldron's conditions of respect.

So, it would seem that the legislation which issues from unfettered party-politics possesses more dignity than that which issues from systems which include Charters, if *only* according to the normative framework put forward by Waldron.[152]

[152] There are plenty of reasons to believe that the acceptability of Waldron's political liberal normative framework ought to be viewed with some skepticism, not the least of which is that it understands party-politics to be more respectful than the flexible Charter suggested by Waluchow. The idea that attempting to insure morally responsible political decision-making renders a manner of policy determination disrespectful would be enough to convince many scholars that Waldron's dedication to

3.4 Conclusion

In attempting to discern the soundness of Waldron's arguments against the adoption of Charters and judicial review, this project has taken up the task of determining whether he made a mistake by arguing against Charters of Rights on the basis that they were less respectful, and possessed less dignity than modern majoritarian politics. In this chapter a new conception of Charters was examined; a conception that was supposed to be immune from Waldron's criticisms, and thereby perhaps take advantage of the idealism implicit in his endorsement of the legitimacy of modern democratic party-politics. However, upon careful review, it would appear that, if Waldron's normative schema is accepted as being definitive, even this new understanding of Charters fails to improve upon, or even match, the respect warranted by parliamentary party politics. At this point it may seem that, if only on the basis of his own normative matrix, Waldron's condemnation of Charters is sound.

However, the discussion will not end here. For the very manner of investigating the acceptability of Waluchow's conception of Charters will be shown to reveal the seeds of a more promising manner of appreciating the legitimacy of such constitutional mechanisms. The following chapter will explore this possibility, in the hope of understanding Charters and their adjudication in a manner that is more readily

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pluralism may well have gone too far. However this project is attempting to refute Waldron on the basis of his own commitments, and to accomplish that task it must accept his skeletal normative matrix.

commensurable with Waldron's normative framework, and thus the democratic institutions which he supports.

CHAPTER 4: The Bigger Picture

Based on an assessment of how well Waluchow's new conception of Charters accommodated the conditions of respect, the preceding chapter reveals that Waldron's claims, concerning the superior dignity of legislation which stems from pure parliamentary politics over that which issues from decision-making procedures that include Charters, still appear to hold, if only on the basis of his own preferred normative framework. Thus, the idealism surrounding Waldron's portrayal of the dignity of modern democratic legislation does not seem to offer a promising route through which his arguments might be undermined. However, the previous investigation may not represent a completely wasted effort. The very nature of the examination of the dignity of Charters reveals an interesting feature of Waldron's position concerning the value of such constitutional mechanisms. Chapter four will explore this quality of Waldron's work, in an attempt to demonstrate that his *own* normative matrix may actually provide more fertile ground for a defense of Waluchow's conception of Charters than is immediately evident, given the previous evaluation of the ability of this understanding of Charters to accommodate the conditions of respect.

4.1 A Problem of Procedure

Up to this point, the investigation of the efficacy of Waldron's arguments against Charters has taken place from within his own theoretical framework; a framework, that

garners its credence from the fact that it gives play to political liberal instincts. Under this approach, the question of whether Charters ought to be adopted by a given society has revolved around the issue of whether they impinge upon the dignity of a state's legislative statutes, as conferred by a polity's decision-making procedures. According to Waldron's conceptual schema, the notion of the dignity of legislation is tied to the ability of a community's manner of policy determination to demonstrate deference to the circumstance of political disagreement realized in every society. More specifically, the fact of such disagreement is a function of the existent perspectives of members of the community. Thus Waldron's position is best understood as an attempt to argue that constitutionally unfettered democratic legislation "deserve(s) our respect...because it is achieved in a way that is respectful *of the persons* whose action-in-concert it represents."[153] As such, the matter of whether a Charter ought to be adopted by a given community is determined by its ability to respect the members thereof.

Based on the investigation of the previous chapter, it would seem difficult, if not impossible, for any community decision-making procedure which includes constitutionally entrenched rights to perfectly or even adequately meet Waldron's standards of legislative dignity: the conditions of respect. Even when Waluchow's new conception of Charters, which understands the role of rights adjudication to be a matter of ensuring the place of sober, careful thought in the determination of social policy, is considered, such a constitutional mechanism still appears to illegitimately infringe upon

[153] *LD* at 109. My emphasis. He continues: "We often think of majority-decision as an impersonal principle – one that is purely aggregative and, like utilitarianism, fails to take individuals seriously. But I want to stress the regards in which majority-decision respects the individuals whose votes it aggregates." (Ibid.)

these conditions by calling for a lack of decisional responsiveness to the *currently stated* views of a populace.[154] Thus, given Waldron's theoretical framework, a Charter cannot help but disrespect the citizenry of the state through its impact upon the process of dignified legislating, and therefore ought to be rejected as an acceptable part of a nation's legal system.

There is something interesting about the character of this conclusion, and about the manner in which it was reached. Waluchow's position is not susceptible to condemnation because it internally privileges any particular substantive moral content in the creation of the law. It cannot be, because *whatever* values happen to be represented within the reflective equilibrium of a nation's constitutional morality would be the norms which inform Charter adjudication under Waluchow's conception, regardless of what they happen to consist of. This manner of conceiving of Charters is permissive of any and all moral values, and as such, it appears to be in keeping with a proclivity for political pluralism. However, given Waldron's framework, Waluchow's conception of Charters would be susceptible to criticism on the basis that it impedes a decision-making procedure's ability to accurately respond to the changing views of the population. Thus, the manner in which Waluchow's conception of Charters is disrespectful is not by parochially condemning the possible political influence of certain moral perspectives, but rather, by potentially being procedurally unwilling to keep *perfect* pace with the changing views of a population. The obviously interesting character of this conclusion is that

[154] This does not mean that Charters, as understood by Waluchow, are necessarily opposed to the content of a polity's currently stated positions, only that the acceptance of such content is contingent upon its being in accord with the content of the constitutional morality demonstrated by the history of a community's moral attitudes and actions.

Waluchow's conception of Charters is not being directly critiqued in regard to its ability to procedurally accommodate the political pluralism called for by the political liberal attitudes which lend credence to Waldron's position.[155]

4.2 A Limited Sense of Respect

This last point may hold the key to responding to Waldron's critique of Charters. However, in and of itself, it does not completely reveal the direction that such a defense might take. In order to appreciate the nature of a possible vindication of Charters, it is necessary to also look at the disposition of Waldron's argumentative strategy.

In all of his writing concerning Charters and the dignity of legislation, Waldron has focused his attention upon the political participation of the individual members of the state. More specifically, he tends only to discuss their activity in relation to the decision-making procedures of the community. It is here, and only here, that Waldron condones giving extraordinary political influence to any value-set. Thus, this is the only place where he caters to the political liberal instincts that underwrite his position.[156] The reason that the circumstance of disagreement is given such a central position within his theoretical framework is that Waldron's understanding of the respect due to the members

[155] It is important to appreciate the limits of this point. A commitment to pluralism does demand, at the least, a high degree of representative accuracy. Such a dedication would be futile within a system incapable of acknowledging the diversity of political perspectives held by the citizenry, within its political procedures. However, because Waluchow's conception of Charters only implies occasional legislative unresponsiveness, and because such unresponsiveness only occurs on the basis of other expressed desires of the community, his position appears able to accommodate a high enough degree of representative accuracy to avoid such problems.

[156] Moreover, as noted in the second chapter, he is only willing to give these liberal values formative, rather than internal influence, in regard to such institutions.

of a polity, his conditions of respect, revolves around their *role as political decision-makers*. This feature of Waldron's argumentative methodology has serious implications for the efficacy of his critique of Charters.

To make sense of this claim, consider the following. A Charter of Rights is a legal mechanism. It exists within a state's constitutional law, and as such is a part of the legal system of a nation. However, there is more to the procedural workings of a legal system than the creation of legislation. The decision-making mechanisms of the state regularly introduce binding social rules; rules which demand adjudication and enforcement. As such, decision-making is only one among a variety of ways that a citizen might relate to the legal system of their community; of the role that they might be seen to assume in relation to it. For example, one might have to decide whether to obey such rules, or even be engaged in the (generally unfortunate) experience of being officially found in violation of such a statute. Encountering the legal system of a state under such circumstances does not situate the community member in the role of legal decision-maker, but rather as legal-subject, or even as legal-subjected.[157] Thus, there seem to be many ways that a member of a political community might relate to, and thereby potentially be procedurally respected by a legal system.

In focusing only upon the decision-making mechanisms of a state, and the correlate role of its citizens, Waldron appears to ignore other manners of appreciating the respect due to members of a political community. When discussing the disrespect

[157] I draw the latter distinction from the work of Michael Giudice, who, in "Normativity and Norm-Subjects" 30 *Australian Journal of Legal Philosophy* (2005): 102-121 at 108, distinguishes between the relationship to the law of citizens who are in a position to *decide* whether to act in accordance with existent legal rules, and the "perspective of participants in legal systems who are, purely speaking, *subjected* to norms."

imposed upon a community by Charters, Waldron talks as though the dignity of such a device could only be derived through its impact upon the decision-making processes of the state; as though this were the only way in which the acceptability of such legal mechanisms ought to be determined. In this manner, Waldron is able to overshadow any other possible respectful contributions made by a Charter, *even those* that would in other ways accommodate or privilege the values of fairness and equality.[158] This feature of Waldron's theoretical approach raises the possibility that by identifying other manners in which a Charter contributes to the dignity of a community's legal system, one could acknowledge the fact that the adoption of a Charter would necessarily cede the claim to perfectly fair and equal legislative procedures, without allowing that there is a valid inference to the rejection of Charters as a respectful legal mechanism. Thus, it may well be the case that Charters could earn their place in a legal system on the basis of respect earned outside of their relationship to the decision-making mechanisms of the state.

4.3 A Liberal Response

This is not a novel approach to engaging Waldron. The works of Aileen Kavanagh and Thomas Christiano, discussed in the first chapter, can also be viewed as making arguments about how Charters end up respecting the citizenry on matters outside of the process of legislating. Additionally, Waluchow takes this approach as a part of his

[158] One way of describing the narrow scope of Waldron's methodological approach, that might be worth later exploration, is to claim that he gives inordinate attention to one of the three categories of H.L.A. Hart's secondary rules. Waldron seems interested in the relationship of citizens to a nation's "rules of change", rather than in their connection to the content of a state's "rules of adjudication", except in how they relate to rules of change.

overall schema for discrediting Waldron's conclusions. However, as was noted earlier, Kavanagh turns to autonomy to augment her position, while Christiano bases his position in the value of the interests of people rather than their wishes. Even Waluchow eventually turns to outside values to bolster his position on this matter, by integrating the unique worth of moral integrity and by arguing for the respectability of Charters on the basis that they bear symbolic worth in designating a community as being dedicated to responsible moral decision-making.[159] By incorporating other moral values into their normative frameworks, such positions may allow Waldron to maintain the claim that his position, and only his position, gives an account of the respectfulness of Charters from within the untainted political liberal normative value-set of fairness and equality. The remainder of this chapter will attempt to engage Waldron on his own moral ground. It will be dedicated to exploring whether there is any justification, on the basis of his understanding of the political liberal values, for claiming that Charters do respect the members of a polity in a way that justifies the inherent infringement that it brings to the dignity of legislation.

In order to determine whether this is a live option, at least three tasks must be accomplished. First, a more precise understanding of Waldron's conception of the principles of fairness and equality must be discerned. By formulating a more specific conception of these notions, which encapsulates Waldron's use of them in discerning the dignity of political processes, there is greater assurance that the respect to be identified in other legal procedures could not be accused of arising from different moral instincts than

[159] *CLT* at 417.

those that guide Waldron's position. Second, some point of citizens' relationship to the law, outside of the legislative process, where Charters contribute to upholding this conception of liberal instincts, must be singled out. Finally, it must be possible to demonstrate that a Charter is able to adequately realize the influence of the aforementioned conception of the liberal values of fairness and equality, by respecting the members of the polity in a manner which is sufficient to justify the indignity which such mechanisms impose upon the process of legislating.

4.3.1 A Familiar Principle

In order to identify Waldron's particular conception of fairness and equality, one need only turn to the conditions of respect as a source, since they are the tool which he uses to identify the means of accommodating these values in the process of political decision-making. In what follows, both the justification for, and the content of these conditions, will be used to illustrate a specific moral maxim which encapsulates the content of Waldron's normative position.

In arguing for the legitimacy of the conditions of respect, Waldron contends that the political perspectives of every individual within a polity merit inclusion in the actual practice of political decision-making because there is no acceptable way to distinguish between positions which are worthwhile from those that are not. Within this argument is the implicit premise that people ought to be treated in a manner that acknowledges the similarity of their political perspectives. Because there is no way to distinguish between

the legitimacy of their positions, the members of a polity and their existent opinions ought to be treated comparably. This attitude is thereafter exhibited in the content of the conditions of respect, which demand that every political conception be enfranchised, and given equal influence. Given this justification and the criteria for respect which results from it, a coherent principle of political respect becomes clear. Waldron's conditions of respect are commensurable with a notion of justice noted by H.L.A. Hart, in *The Concept of Law*. He writes:

> There is something to be respected in the vicissitudes of social life when burdens or benefits fall to be distributed; it is also something to be restored when it is disturbed. Hence justice is traditionally thought of as maintaining or restoring a *balance* or proportion, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'[160]

In claiming that the good of political influence ought to be distributed equally to each member of a community, on the basis that there is no way to legitimately distinguish between the acceptability of the content of their perspectives, Waldron uses this principle to tease out the demands of equality and fairness in regard to a community's decision-making processes.[161] As such, it is this precept that will be used to discern whether there might be other aspects of a polity's legal system that are respected by the introduction of a Charter of Rights.

4.3.2 Fairly Subjected

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[160] *CL* at 155.

[161] The term "good" is used in its economic guise as referring to quantifiable means to satisfy preferences.

In much of the literature surrounding Charters, these constitutional mechanisms are lauded on the basis that they help to insure continuity in the moral content of the law; that they slow political change down to some degree. Indeed, by claiming that such devices could insure that no inauthentic political decisions were made by a community, this notion was shown to be at the heart of Waluchow's position. However, so far, this facet of Charter adjudication has not been shown to be congruous with Waldron's normative framework. In what follows, it will be argued that by appealing to the fact that Charters contribute to insuring moral continuity in the content of the law, they can be shown to respect the members of a polity in accord with the political liberal instincts manifested in Waldron's normative position.

By introducing the notion of treating like cases alike into his discussion of the place of citizens within the decision-making mechanisms of the state, Waldron argues for the dignity of majoritarian legislation on the basis that it fairly and equally confers the *benefit* of political influence upon each member of the polity. In order to assert that Charters are able to respect the members of a polity in another manner, the attention of this discussion will be oriented in the opposite direction. At least one instance of Charters' ability to respect the citizens of a state comes from their contribution towards insuring that a *burden* placed upon members of a community is adjudicated in accord with the abovementioned precept.

The notion of a legal system is often associated with the use of coercive force. Such force, when attached to breaches or violations of legal norms, is generally referred to as a punishment or sanction. When a member of a community faces a sanction on the

basis of having violated the law(s) of the polity, that individual finds himself relating to the legal system of the state simply by being subjected to its content, and as such to whatever it holds the sanction to be for behaving in a particular (relevant) manner. Thus, when a community adopts a legal system it creates the potential for the distribution of burdens upon the members of a population.[162] It is in regards to the plight of such potentially legal-subjected individuals, and the burdens that they may be forced to endure, that Charters can help to realize the demands of the political liberal precept of like cases being treated alike.

As has been noted, whether under Waluchow's understanding of them, or the standard conception, Charters contribute to the maintenance of moral coherence within the content of the law. This point bears directly on the plight of potential legal-subjecteds, in that Charters help to insure that, in its legal adjudicative and enforcement procedures, a state is not forced to subject its members to erratic sanctions on the basis of morally haphazard legislation which might issue from a community's decision-making procedures. If a legislative body were to pass a series of laws in quick order, concerning the same social issue, but based on a variety of moral grounds, the potential arises for members of the polity who engage in the same behavior within close temporal proximity to face sanctions which are justified and implemented on the basis of greatly dissimilar, perhaps even flatly contradictory, moral norms.[163] By demanding that, *at the least*, there be a slow and incremental change to the moral content of legislation which is given effect

[162] While it might be objected that sanctions are not a conceptually necessary part of legal systems, they are a part of every existent system of which I am aware.

[163] This example also presumes that the individuals who are being compared have a similar legal status. For example, the case of a person with diplomatic immunity is not sufficiently similar to the case of an individual without it to justify their cases being adjudicated in a like manner.

within a legal system, Charters can reduce, or in the standard case, perhaps even eliminate the possibility of such an occurrence. By introducing continuity into the legislative process, such constitutional mechanisms contribute to the reduction of cases where members of a state are treated disparately by the adjudicative or enforcement procedures of the law, on the basis of legislation that is arrived at in an indiscriminate moral fashion.[164] These mechanisms help to realize the influence of the principle of treating like cases alike in regard to those individuals who might potentially find themselves in the often unpleasant role of the legal-subjected. In this way Charters can be seen to overtly contribute to respecting the individuals in a state, in a manner derived from the Waldron's own moral position. In this way, the feature of Charters most directly critiqued by Waldron can be seen to be in accord with the demands of his own normative framework.

4.3.3 Once More on the Scales of Respect

Charters can be seen to make a positive contribution towards respecting the individuals of a state in regard to their relationship to the adjudicative and enforcement procedures of legal systems, on the basis of Waldron's own value-set. It still remains to be determined whether such a contribution is sufficient to outweigh the inherent

[164] Ronald Dworkin makes a similar claim for the value of integrity of legal principles in the adjudicatory processes of a state that is particularly fitting in regards to Waldron's arguments. In *Laws Empire* he writes, "We believe in integrity because we believe that internal compromises would deny what is often called 'equality before the law' and sometimes 'formal equality'...it demands fidelity not just to rules *but to the fairness and justice that these rules presuppose by way of justification*" (185. My emphasis.)

disrespect that a Charter visits upon the decision-making procedures of a state, as determined by the political liberal instincts which underwrite Waldron's position.

Where the standard conception of Charters is concerned, it is clear that this is not the case. By forcing a community's current and future determinations of policy to conform to a single set of norms, a set which is treated as being the correct moral framework, Charters deny the relevance of the circumstances of disagreement and the doubt which it casts upon the legitimacy of any such treatment. Though a Charter, thus conceived, would certainly appear to aid in maintaining the integrity of the moral content of the law, the insult which it delivers to nonstandard political perspectives far outweighs the respect that it provides.

On the other hand, Waluchow's conception of Charters does not face the same problem. By making certain that the moral content of the law can change only in a manner that maintains the reflective equilibrium of a community's constitutional morality, Charters still contribute to ensuring that relevantly similar behaviors by various members of a community, within a reasonably close timeframe, are legally dealt with in a comparable manner. Yet, unlike the standard conception, this manner of understanding Charters does not imply that any political values are somehow better, or inherently deserve more influence. It does not necessarily deny political influence to any particular value or principle per se. Thus, Waluchow's conception of Charters is respectful of the citizens of a state, within the circumstances of disagreement, by acknowledging and accommodating for political pluralism, while simultaneously recognizing and working to honor the respect due to citizens as legal-subjecteds. On this basis the introduction of a

Charter, thus conceived, into the legal system of a state would seem to ensure that its legal procedures are compatible with a formidable amount of respect for the members of a community in a number of procedural loci. When seen in this light, Waluchow's conception of Charters seems to overcome, or at least balance, the legislative indignity of potentially being unable to immediately provide a legal response to a legitimate change in the attitudes of the public, by insuring that erratic decision making, whether legitimate or illegitimate, does not create the unfair and unequal legal treatment of members of the public. On this basis, and under this conception of Charters of Rights, the scales of respect seem to have tilted back in favor of constitutionally entrenching such moral rights.

While this conclusion appears to be correct, there is still room for Waldron to contest it. He might, for example, argue that any claims to the legitimacy of Charters of Rights, on the basis of their ability to respect the people of a state, ought to involve a much more careful calculation. On these grounds it might be argued that the respect derived from a polity's decision-making procedures inherently regards *every* member of a community, while the respectful nature of a state's adjudicatory and enforcement procedures would likely only ever apply to a small percentage of that nation's citizens. Such a critique is certainly worth considering. However, in order to insure that the overall respectfulness of Charters was being calculated, it would also be necessary to consider all the other potential manners of understanding the relationship between the members of a polity and the legal procedures of the state, where such constitutional mechanisms might be argued to respect the citizenry. Thus, at this point in the discussion

it is not possible to determine whether the weight of respect is with Charters or against them. Indeed, finding an answer to that question would be a project unto itself. Consequently, it would seem that the important point to be gleaned from this discussion is that although Waldron's position appeals to the political liberal instincts towards fairness and equality, and the pluralism that such values call for in the face of ubiquitous disagreement, it by no means holds a monopoly on the ability to appeal to this theoretical perspective for support within the Charter debates. In adopting the values of fairness and equality, Waldron has not won a decisive victory over Charters. Rather, his position, in conjunction with that of Waluchow's, has opened up fertile ground for the continuation of this debate, and as such he seems to have left himself much more work to do before being able to demonstrate the unacceptability of Charters of Rights on the grounds that they are a disrespectful institution.

4.4 Conclusion

In "The Core of the Case Against Judicial Review" Waldron concludes his arguments against Charters with the following paragraph:

> Disagreement about rights is not unreasonable, and people can disagree about rights while still taking rights seriously. In these circumstances, they need to adopt procedures for resolving their disagreements that respect the voices and opinions of the persons -in their millions-whose rights are at stake in these disagreements and treat them as equals in the process. At the same time, they must ensure that these procedures address, in a responsible and deliberative fashion, the tough and complex issues that rights-disagreements raise. Ordinary legislative procedures can do this, I have argued, and an additional layer of final review by courts adds little to the process except a rather insulting form of

> disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights.[165]

The arguments in this chapter have demonstrated that one can grant Waldron much in regard to these claims, while not necessarily accepting his rejection of Charters and the attendant feature of judicial review. One might accept that pure parliamentary politics does a better job of responding to the views of the people than when the process involves Charter review, and that nothing is added to this legislative process by the courts.[166] Yet *still* this is not a valid argument for rejecting such constitutional mechanisms. For by broadening the scope of the discussion of the legitimacy of Charters beyond their effects upon the decision-making processes of the state, the indignity visited upon the voices of the people is revealed to be only one piece of a larger puzzle.

In proffering his conception of Charters, Waluchow argued for such constitutional mechanisms on the basis that the continuity they bring to the content of the law contributed to morally responsible decision-making. This argument though convincing, does not speak to the concerns of Waldron. However, the very same feature of Charters can also be justified on the grounds of fairness and equality, the principle of treating like cases alike, and the liberal instinct towards pluralism, all of which Waldron previously used to condemn such mechanisms. Whether this support will eventually be seen to be sufficient to defend Charters is uncertain. What is clear is that in order to determine whether the political liberal perspective calls for the rejection of Charters, it is necessary to look beyond the respect due to citizens in their roles as political decision-makers; it is

[165] Jeremy Waldron. "The Core of the Case Against Judicial Review." 115: 6 *The Yale Law Review* (2006): 1346-1406 at 1406.

[166] Though Waluchow's arguments concerning the contribution of Charter adjudication to responsible moral decision-making seems to belie these claims.

necessary to look at the *many* ways that Charters affect the manner in which citizens relate to the law. Thus, it is reasonable to assert that, by arguing against Charters solely in regards to their effects upon the legislative indignity they introduce, Waldron is unable to satisfactorily demonstrate that Charters and the attendant practice of judicial review represent an unacceptable legal institution.

Conclusion

In this thesis it has been argued that Waldron's work concerning Charters of Rights is worth consideration because he combines an influential moral framework of the political liberal values of fairness and equality, with a descriptive conception of the world that acknowledges the existence of ubiquitous political disagreement. It has been further argued, that the argument against Charters, which Waldron develops out of this theoretical position, is deeply flawed. By focusing solely upon the disrespect which the constitutional inclusion of a Charter imposes upon the decision-making procedures of a democratic state, Waldron has overlooked other areas of legal activity where such mechanisms can contribute to the respect with which a state's political procedures treat its citizens. Invoking Waluchow's work, it is possible to argue that Charters increase the aggregate respect granted to a population through a nation's legal procedures, as determined precisely by the values of fairness and equality, though the conclusion of this argument is provisional, pending a more thorough investigation.

Thus, the primary conclusion to be drawn from this endeavor is that Waldron's limited application of the values of political liberalism has left him arguing for the disrespect and indignity of Charters of Rights on a selective basis; a basis that makes his conclusions concerning the undesirable nature of Charters and judicial review unacceptable, even if one is willing, for the sake of argument, to grant him the legitimacy of his value set.

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