

CAROLENE PRODUCTS REDUX:
AN ARGUMENT FOR JUDICIAL REVIEW OF LEGISLATION,
AGAINST THE FUTURE PREJUDICE OF DISCRETE AND
INSULAR MINORITIES

*John Crook**

Abstract – Footnote four of US Supreme Court Justice Stone’s judgment in *Carolene Products* sets out a counter-majoritarian safeguard justification for judicial review of legislation. Jeremy Waldron’s so-called ‘core-case’ against judicial review of legislation is premised upon certain assumptions, without which Waldron himself concedes his arguments would not be sufficient. Waldron assumes that in liberal democracies most members of society and most of its officials are committed to the idea of individual and minority rights. He argues that it follows from this that the justification for judicial review set out in *Carolene Products* footnote four does not apply. This assumption underestimates the potential for future prejudice of discrete and insular minorities in liberal democratic states. *Contra* Waldron, I suggest that there is no contradiction in noting our capability of moral reasoning, which makes us worthy right-bearers, and our moral fallibility, which is the basis for judicial review of legislation. Evidence suggests we should be pessimistic about whether we can reliably fulfil our moral capability. If legislatures may not perform their functions in accordance with right reason, we should utilise constitutional rights and judicial review of legislation as a safeguard to minimise error.

“The one thing that does not abide by majority rule is a person’s conscience.”

– ‘Atticus Finch’ in Harper Lee’s *To Kill a Mockingbird*

In footnote four of his judgment in *Carolene Products* Justice Stone stated that: “Prejudice against discrete and insular minorities may be a special condition... which may call for a correspondingly more searching judicial inquiry.”¹ The footnote should be seen in the context of the constitutional crisis between the US Supreme Court and Congress in the wake of Franklin D. Roosevelt’s New Deal, the economic reforms that were enacted from 1933 onwards in the wake of the Great Depression. At the time, a majority of the US Supreme Court’s nine judges had been appointed by Republican Party presidents. The Supreme Court doctrine at the time, following *Lochner*

* LL.M. (UCL); Researcher at the Constitution Unit in the Department of Political Science at University College London; trainee solicitor at Debevoise and Plimpton LLP.

¹ [1938] 304 US 144, 152 n 4.

*v New York*², safeguarded business liberties against regulatory encroachment. The pre-1937 Court had held that New Deal legislation impinging upon these business liberties was not aided by the usual presumption of constitutionality and was presumptively unconstitutional. In 1937-1938, the Court's position began to change; this change was secured when Justice Black succeeded Justice Van Devanter and the Court's business-protecting bloc lost its majority. The Court was politically discredited by its defence of *laissez-faire* capitalism against the will of Congress and, as such, the institution of judicial review needed rejuvenation.

So it was appropriate that *Carolene Products* footnote four employed an idea of democracy, which included egalitarianism as well as participation, to serve as a foundation for constitutional rights and judicial review of legislation in the United States. The footnote states that there should be a higher level of judicial scrutiny of legislation, where it discriminates against minorities, particularly those who lack sufficient numbers or power to seek redress through the political process. So the footnote sets out an egalitarian, counter-majoritarian justification for judicial review of legislation. By safeguarding "discrete and insular minorities" from legislation prejudicial to them, the intention behind the wording of the footnote is to ensure that citizens are treated with equal concern and respect in democratic political decision-making.³

Disputing the relevance of this safeguard rationale, Jeremy Waldron has made a penetrating and influential case against judicial review of legislation. As a legal positivist, he has argued that he does not need to rely on his own metaethical views in building a case against judicial review of legislation. Yet, Waldron's core-case against judicial review of legislation is premised upon certain assumptions, without which Waldron himself concedes his arguments would not be sufficient. These assumptions include: (α) the commitment of most members of society and most of its officials to the idea of individual and minority rights; and, (β) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.⁴

² [1905] 198 US 45.

³ Louis Lusky, 'Footnote Redux: A "Carolene Products" Reminiscence' (1982) 82.6 *Columbia Law Review* 1093; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 75-77.

⁴ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale LJ* 1346, 1360. Waldron also assumes that the legislature and the judiciary are in "reasonable working order".

Waldron assumes, reasonably, that most members and officials in liberal democratic societies are committed to the idea of individual and minority rights. Accordingly, he believes that the assertion made by Justice Stone in footnote four of his judgment in *Carolene Products Company*,⁵ that “prejudice against discrete and insular minorities” may justify judicial review of legislation, does not apply in such liberal democratic societies, because ‘discrete and insular minorities’ are not prejudiced where (α) most members and officials of a society are committed to the idea of individual and minority rights. Waldron notes that “[the prejudice of discrete and insular minorities] ... is an excellent way of characterizing the sort of non-core-case in which the argument for judicial review of legislative decisions has some plausibility.”⁶ But, in my view, it would be erroneous to assume that assumption (α), that most members and officials of a society are committed to the idea of individual and minority rights, will always be true of states which are ‘liberal democracies’.

I argue that a community’s political institutions should be designed so that they are likely to make political decisions in accordance with right reason, rather than maximise the degree of participation, expressing popular opinion. That p is true is not determined by the number of people that believe that p . Waldron suggests we should use a popular majority decision procedure (MDP) as a ‘second-order’ decision procedure on pragmatic grounds to determine the most legitimate ‘first order’ decision procedure.⁷ I reject this idea because choosing MDP prejudices the second-order decision-maker in favour of choosing MDP at the first-order, so it cannot be ‘legitimacy-free’. Furthermore, *contra* Waldron, I suggest that there is no contradiction in noting our capability of moral reasoning, which makes us worthy right-bearers, and our moral fallibility, which is the basis for judicial review of legislation. Evidence suggests we should be pessimistic about whether we can reliably fulfil our moral capability. As such, if assumption (α) is true of liberal democratic states, that state of affairs is particular, conditional and transient. If popular MDP of legislatures may not perform their functions in accordance with right reason, we should utilise

⁵ [1938] 304 US 144, 152 n 4.

⁶ Waldron (n 4) 1403.

⁷ First-order reasons are those which apply to subjects in the absence of consideration of any social institutions or norms. Second-order reasons are reasons about reasons, and are characteristically found where there are social institutions and norms. Cf. Joseph Raz, *The Authority of Law* (Clarendon Press, 1979).

constitutional rights and judicial review of legislation as a safeguard to minimise error.

A. WALDRON'S ARGUMENT AGAINST JUDICIAL REVIEW OF LEGISLATION

Waldron argues against constitutional rights and their interpretation in judicial review of legislation as follows:

1. Liberal democratic societies are characterised by (β) – persisting, substantial and good faith disagreement. This assertion differs from Rawls's assertion that there exists a permanent, reasonable diversity of conflicting and irreconcilable comprehensive doctrines. Whilst Rawls believed that an overlapping consensus could be achieved between these comprehensive doctrines on a conception of justice, rights and fairness in an ideal society with social stability, Waldron disagrees, believing reasonably that we live in a non-ideal society of *modus vivendi*. He contends that disagreement extends beyond conceptions of the good life, to our conceptions of justice, rights and fairness.⁸
2. When there is disagreement in a society about a matter on which a common decision is needed, every member has the right to participate on equal terms in the resolution of that disagreement.⁹ This should be understood as a right to participate in all political decisions made governing their community, which means having an equal say in social decisions on issues of moral principle, and not just interstitial matters of socio-economic policy.¹⁰ Whilst the purpose of law is to enable us to act in the face of disagreement, insofar as every society needs collectively binding decisions, the creation of those laws must proceed by 'democratic' means alone.¹¹
3. By ceding power to the courts to review a decision enacted by a fairly elected legislature, constitutional rights undermine democratic institutions. The right of citizens to participate in political decisions is compromised when proposals are made to shift decisions about the conception and revision of fundamental rights from the legislature to the courtroom, from the people and their (admittedly imperfect)

⁸ Jeremy Waldron, *Law and Disagreement* (OUP 1998) 158; John Rawls, *Political Liberalism* (2nd edn, Harvard University Press 2005) 327.

⁹ Waldron (n 8) 283.

¹⁰ *ibid*, 13.

¹¹ *ibid*, 213.

representative institutions to a handful of people, who are supposedly wise, learned, and virtuous, who alone should be trusted to adjudicate the significant issues that fundamental rights raise.¹² As such, if constitutional rights exist, the courts become the forum for the revision of these rights, as society changes and new social controversies emerge,¹³ because when a provision is entrenched in a written constitution, the claim-right to liberty or provision that it lays down becomes immune to legislative change, in effect, disabling the legislature from its normal functions of revision, reform, and innovation in the law.¹⁴

B. SEMANTICS, DEMOCRACY AND PARTICIPATION

Immediately, we are faced with a problem when considering the merits of Waldron's claims about constitutional rights and judicial review of legislation with regard to the term 'democracy': there are competing meanings attributed to the term 'democracy' which reflect competing conceptions of democracy. Waldron identifies democracy as the right of majorities to rule. This has the advantages of simplicity and the frequent employment of popular majority-rule voting. Another meaning, adopted by the late Ronald Dworkin amongst others, is more complex but, arguably, more plausible. It insists that political systems be organised on the basis of an abstract principle of political morality: political equality, whereby citizens have an equal voice over governmental decisions. It allows opportunities for majority-rule voting and direct popular participation to play important roles in working democracies, but it asserts that legitimate democracies are those that respect minority rights and promote fair and inclusive deliberation.

Existing democratic systems have counter-majoritarian elements, including judicial review of legislation: this has implications for the meaning of 'democracy'. For example, we do not hesitate to call the US or Germany, both of which have judicial review of legislation, democratic states. So to avoid confusion, I will adopt Dworkin's meaning of democracy when using the term 'democracy', because I think Dworkin's idea is closer to how people largely understand the term. I will use the term 'popular majoritarianism' to refer to what Waldron understands as democratic.

In comparing the merits of a legislature's popular MDP and judicial decision procedures, Waldron seems to assume that they are underpinned by

¹² *ibid*, 283.

¹³ *ibid*, 213.

¹⁴ *ibid*, 221.

alternative, mutually exclusive accounts of political authority. Yet, even for the purposes of strong judicial review, judicial authority is limited to the protection of constitutional rights. The judiciary does not even have authority to decide all matters related to constitutional rights that are allocated to the courts under judicial review. As Kavanagh has observed, much of the detailed regulation of rights is carried out by the legislature in the course of policy making decisions, not all of which will be in response to judicial decisions.¹⁵ The fact that judicial review is not a complete theory of political authority means that arguing for judicial review does not amount to a rejection of MDP. Rather, in examining such an argument, we are merely considering the extent and scope of MDP: whether there is a case for restricting the scope of MDP concerning constitutional rights.

No political system which prevents citizens from playing a part in the decision-making process can be democratic. But MDP by the legislature is only one form of participation, there are others, including judicial review.¹⁶ The exact kind or degree of participation that is desirable is subject to debate. As such, a popular MDP by a legislature is not axiomatic of democracy, given the value of participation.¹⁷

That there is value in participation is undisputed: first, it confirms the individual's equal membership or standing in the community. Guaranteeing an equal right of participation evinces a "public recognition of equal respect for the autonomy of persons ... a communal acknowledgement of individual worth."¹⁸ It provides affirmation that one is regarded by others as a person whose opinions and choices are of value. This increases citizens' sense of affinity to their community. Second, it is important that people are able to express, assert and act upon their moral convictions and commitments in the public domain, because it enhances a person's sense of worth if they can communicate their views to others and attempt to convince them of their correctness.¹⁹ Dworkin sees these participatory benefits as consequential,²⁰

¹⁵ Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22.5 *Law and Philosophy* 451, 752-5.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Charles R Bietz, 'Procedural Equality in Democratic Theory' in *Nomos XXV: Liberal Democracy* (NYUP 1983) 74-5.

¹⁹ Ronald Dworkin, 'What Is Equality? Part 4: Political Equality' (1987) 22 *University of San Francisco Law Review* 1, 4-5, 19-23.

²⁰ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 187.

whereas Waldron believes that, because these benefits are directly related to the *right* to participation, they are intrinsic benefits.²¹

Does Waldron really think that there are no possible good effects that could count in favour of judicial review, or any other deviation from MDP? Would Waldron really insist that, if judicial review of legislation was the only means of preventing, say, ethnic cleansing, this fact would not count towards justifying judicial review? If so, the argument would appear to be a *reductio ad absurdum*.²² He would respond that such an example would be outside his core-case that it does not conform to assumption (α). But it is hard to see how a right can be conditionally intrinsic, of intrinsic value in one set of circumstances (core-cases) and of instrumental value in another set of circumstances (non-core-cases). Regardless, I reject the truth of assumption (α) in the future in states that are, at present, what we would regard as liberal democracies.

Following these objections, we can consider what Dworkin has in mind: the “instrumentalist condition of good government”²³, that a community’s political institutions should be designed so that they are likely to make political decisions in accordance with right reason. It is “the fundamental criterion for judging any procedure is the justice of its likely results ... the test of constitutional arrangements is always the overall balance of justice.”²⁴ Democratic government is subject to the instrumentalist condition because what is just, right or fair does not always correspond with what is voted for through popular MDP.

Waldron privileges the right to participation over other rights. But if we disagree about rights, why is the right to participation immune from this? The right to participation is not uncontested. We could satisfy Waldron’s concerns about participation just as easily by drawing the straws as by using MDP.²⁵ Drawing straws would give citizens an equal and direct influence over the outcome. But drawing straws is not a satisfactory solution: outcomes matter.

People participate in politics to influence politics in favour of a morally good state of affairs, in an attempt to achieve their preferred

²¹ Waldron (n 4) 1373.

²² David Enoch, ‘Taking Disagreement Seriously’ (2006) 39.3 *Israel Law Review* 22, 26.

²³ Joseph Raz, *Ethics in The public Domain* (OUP, 1994) 117; Rawls, *A Theory of Justice* (Harvard University Press 1971) 232.

²⁴ Rawls (n 22) 230.

²⁵ David M Estlund, ‘Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority’ in Thomas Christiano (ed), *Philosophy and Democracy* (OUP 2003), 81-83.

outcomes. Yet, popular preference does not transform a morally wrong state of affairs into a state of affairs that is morally right: that *p* is not true by the number people making the assertion that *p*. Where political decisions with moral content are made, such decisions can be assessed in light of the morality of the states of affairs they establish or actions they authorise. The fact that decisions are taken by a majority does not preclude, or at least should not preclude, such evaluation. There is an independent criterion for deciding which outcome of the decision-making procedure is just, but it is impossible to design a procedure that will always lead to the right result. Whether a decision is just or unjust is not itself determined by the properties of the procedure from which the decision results.²⁶

I would argue that the intrinsic value of the right of participation does not compromise the central importance of the “instrumentalist condition of good government”.²⁷ Waldron assumes that the MDP that elects the legislature is the only appropriate means of affecting the right of participation; yet judges are also selected from among the people, albeit not by a voting procedure. With the rise of the career politician, both groups of representatives are in some way selected from an elite pool. Kyritsis has argued that “the decisions of legislatures are made on behalf of the people and are meant to be binding on the people, but they are not made by the people in any but a metaphorical sense.”²⁸

Kyritsis distinguishes a ‘proxy’ account of legislators, where the legislator’s role is to express the views held by his constituency, from a ‘trustee’ account where, though responsive to their constituents, legislators have the power to decide to some degree independently of their constituents’ convictions. Kyritsis argues that the ‘trustee’ model more accurately reflects the practice of political representation. If the ‘proxy’ model were the more accurate model, mechanisms like the imperative mandate or the revocability of the representative by his constituents would be much more popular than they actually are. In fact, they are quite rare. All voters can do to express their dissatisfaction with a delegate is to vote him out of office in the next election. But this does not affect the institutional significance of the decisions he had voted for. On many issues citizens do not even have determinate views, which it would be the representative's job to implement at the institutional level: electors often vote for candidates on the basis of

²⁶ Kavanagh, (n 15) 458-63.

²⁷ Joseph Raz, *Ethics in The public Domain* (OUP 1994) 117; Rawls (n 22) 232.

²⁸ Dimitrios Kyritsis, ‘Representation and Waldron’s objection to judicial review’ (2006) 26.4 *Oxford Journal of Legal Studies* 733, 741.

their views on a limited number of political questions, but have no view on the rest of his agenda. As such, “the putative attitude of disrespect cannot lie in the mere fact that judges make independent moral judgments in the name of the political community, even against the expressed views of (many) participating citizens, as is often claimed.”²⁹

C. WALDRON’S PRAGMATIC ARGUMENT FOR A SECOND-ORDER MAJORITY DECISION PROCEDURE

People disagree about the value of majoritarian participation, just as they disagree about the value of having constitutional judicial review. Waldron’s response is to say we can use MDP in a pragmatic way:

“It is simply to use it ... if we choose one of the procedures which are up for decision as the procedure for making that very decision, we do so simply because we need a procedure on this occasion and this is the one we are stuck with for the time being.”³⁰

How can using a particular decision procedure in order to decide which decision procedure is most legitimate, avoid privileging that second-order procedure? Nor is it clear how resorting to ‘pragmatics’ can sidestep the question of legitimacy. Dworkin rebuts this response by appealing to our intuition: “It would not be any fairer for a majority of lifeboat passengers first to vote to hold an election and then to vote to throw the cabin boy out in that election than for them to vote to throw him out directly.”³¹ In other words, we can never justify a procedure if its outcome is substantively immoral. So, in making this appeal to our intuition, Dworkin resorts to a restatement of the central importance of the ‘instrumentalist condition of good government.’

We can, however, go further than Dworkin, and attempt to further elaborate the concrete reasons why it is not possible to choose a second-order decision on pragmatic grounds alone. If we use a procedure to determine which decision procedure to pursue without knowing whether or not it is legitimate, then we have no reason to accept the outcome of such a procedure as authoritative. That one procedural arrangement should be used in preference to another prompts the question as to why that arrangement should have better claim for our support than any other.

²⁹ *ibid* 744.

³⁰ Waldron (n 8) 300; Cf. Jeremy Waldron, ‘A Majority in the Lifeboat’ (2010) 90.2 *Boston University Law Review* 1043, 1043ff.

³¹ Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 387.

Waldron must provide reasons as to why his preferred procedure has a value that both outweighs outcome-based reasons and that does not collapse into such outcome-based reasons. As Kavanagh notes, “the proceduralist response that [popular MDP] is the mechanism ‘we are stuck with for the time being’ ... does not carry any moral weight: it gives no good reason to ‘stick with it’ in the future.”³² Second-order decision procedures refer directly to the distinction between popular majoritarianism and popular sovereignty.³³ Questions regarding the method in which decisions about constitutional essentials should be resolved (by majoritarian or legal institutions) are the same questions that Hobbes and Locke examined when contemplating a social contract.³⁴ Both Hobbes and Locke believed in popular sovereignty, the right of decisions about constitutional regimes to be made by MDP; both gave reasons for this belief.

In contrast, Waldron claims that this area is a ‘legitimacy-free zone’ and that all our decision procedures are equally acceptable because all can be chosen pragmatically. In my view, however, Waldron privileges popular majoritarianism, because to use popular majoritarianism as the means to resolve disagreements about constitutional basics is to give it precedence over other procedures at the second-order level, and this inevitably privileges the likelihood that it will be the preferred procedure at the first-order level.

If pragmatic arguments fail for the reasons given above, Waldron needs to identify reasons to value popular majoritarianism and reasons to prefer it to other decision-making procedures. But, in doing so, Waldron cannot avoid appealing to the moral considerations pertaining to the value of popular majoritarianism in order to argue convincingly against other second-order procedures.³⁵ However, as Fabre has suggested, “by appealing to such moral considerations, Waldron would be vulnerable to the charge that he is in fact pre-empting the expressions by citizens of their conflicting views on those moral considerations themselves.”³⁶

Waldron does offer a reason for advocating popular majoritarianism. Referring to non-‘democratic’³⁷ decision procedures:

“They have in addition one legitimacy related defect that popular majoritarianism does not have: they do not allow a voice and a vote in

³² Kavanagh (n 15) 469.

³³ Waldron (n 8) 254.

³⁴ *ibid.*, 255-7.

³⁵ See Cecile Fabre, ‘A Philosophical Argument for a Bill of Rights’ (2000) 30 *British Journal of Political Science* 77, 78.

³⁶ *ibid.*

³⁷ Here I refer to ‘democratic’ following Waldron’s understanding of the term.

a final decision-procedure to every citizen of the society; instead they proceed to make final decisions about the right of millions on the basis of the votes of a few.”³⁸

If we are in a legitimacy-free zone, how can one method have greater legitimacy than another, as Waldron indicates here? If second-order decision procedure is a purely pragmatic choice between popular majoritarianism and other methods, questions of legitimacy do not arise in this way because moral reasons cannot be given because there is no shared moral basis from which reasoning can proceed. Hence, Waldron’s claim that we should use a second-order MDP would have no impact because it is the significance of such points that is the subject of disagreement. That Waldron makes such a claim suggests that moral rather than pragmatic considerations underpin Waldron’s preference for popular MDP for second-order decisions. That this is not explicitly stated in *Law and Disagreement* suggests that Waldron is sensitive to the charge of prejudging the moral considerations of citizens, the avoidance of which is the starting point for his whole project.

The suspicion is that, despite arguing to the contrary, Waldron’s view on judicial review of legislation is motivated by his metaethical views. Waldron is an emotivist.³⁹ He believes that ethical judgments do not express propositions or beliefs that can be true or false. Instead, they express sentiments or feelings about certain actions, which cannot be either true or false. As AJ Ayer put it:

“if I say to someone, ‘You acted wrongly in stealing that money,’ I am not stating anything more than if I had simply said, ‘You stole that money.’ In adding that this action is wrong I am not making any further statement about it. I am simply evincing my moral disapproval of it. It is as if I had said, ‘You stole that money,’ in a peculiar tone of horror, or written it with the addition of some special exclamation marks . . . If now I generalise my previous statement and say, ‘Stealing money is wrong,’ I produce a sentence which has no factual meaning – that is, expresses no proposition which can be either true or false.”⁴⁰

³⁸ Waldron (n 8) 299.

³⁹ Waldron, ‘Moral Truth and Judicial Review’ *American Journal of Jurisprudence*, 43 (1998); Waldron, ‘The Irrelevance of Moral Objectivity’ in George (ed.) *Natural Law Theory: Contemporary Essays* (OUP Clarendon Press, 1992).

⁴⁰ AJ Ayer, *Language, Truth, and Logic* (Dover Publications, 1952) 107.

So Waldron believes that when a person says ‘That is wrong!’ they are merely making a noise to express their view, you may as well be saying ‘Boo!’ It follows from this view that a MDP by legislators might be an appropriate way for a polity of citizens to express its feelings: where moral propositions are merely emotive and, thus, non-cognitivist, arguments about the process of deliberation on moral issues are less significant than the right to participate, to make one’s feelings heard, for that is all one can do. This assertion is undermined by Kyritsis’s aforementioned suggestion that legislators often do not express the views held by their constituents.⁴¹

There are good grounds for rejecting emotivism as a metaethical theory. It seems possible to judge something as morally wrong without having any emotional reaction to it, or even feeling positive about it. For example, the ‘amoralist’ – a person who knows what’s right and wrong but doesn’t care – seems imaginable. Furthermore, if moral judgments are in fact just expressions of emotion, they can’t contradict each other, and we can’t reason about them, so why argue? Ayer argues that we stop engaging in moral disputes once all matters of empirical fact have been settled. But we do argue about the morality of an act. On Ayer’s account we cannot contradict one another when discussing moral issues because our statements are non-cognitive.

The sort of disagreement that Waldron alludes to in his argument against constitutionally entrenched rights undermines his own metaethical position. Even if we can’t settle our disputes about moral judgments, we still contradict each other when, for example, we argue about the morality of abortion. So emotivism doesn’t seem to be able to account for the way we make moral judgments. Our practice of making moral judgments treats such judgments as propositional in a number of ways – we use them in logical arguments, inferring from them, we ‘embed’ them in other kinds of statements and use them in un-asserted context.⁴² So we have good grounds to be skeptical about a constitutional hypothesis that is motivated by emotivism.

D. DISTINGUISHING MORAL CAPABILITY AND MORAL FALLIBILITY

Waldron asserts that the case for judicial review relies on an unduly pessimistic and distrustful view about the capacity of the democratic political process to protect fundamental human rights.⁴³ To Waldron’s mind,

⁴¹ Kyritsis (n 28) 741.

⁴² Peter Geach, ‘Assertion’ (1964) 74 *Philosophical Review* 449-465.

⁴³ Waldron (n 8) 221-3.

the claim that judicial review is necessary to protect individual and minority rights “is only plausible as long as one thinks that proper regard will not be paid to individual rights in the democratic and representative processes”; i.e. where assumption (α) is false.⁴⁴ In contrast, according to Waldron, we should assume that “voters and legislators are capable of focusing their deliberations on the general good and on some sense of the proper balance that should be held among individual interests in society”; i.e. where (α) is true.⁴⁵

According to Waldron, the arguments for judicial review are at odds with the basis on which we protect the rights that supporters of such a provision are seeking to protect: human beings are responsible moral agents with the capacity for autonomy.⁴⁶ Waldron believes that that attribution of rights to humans is based on a Kantian view of human beings as right-bearers being autonomous and having ability to reason morally and exercise their rights in a responsible and moral way. If we propose to design our institutions on the basis that people will act irresponsibly or irrationally, then we infer the paradoxical belief that people are not worthy of the rights we wish to protect:

“This attitude of mistrust of one’s fellow citizens does not sit particularly well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are being entrenched in this way.”⁴⁷

However, if we adopt the trustee model of legislators, this critique would be a problem for the legislature as much as the courts upholding citizens’ rights. We should not doubt that human beings have a *capacity* to deliberate about rights or to strive for their protection. Nor should we doubt that people are *capable* of voting in a moral way, or in a way that looks beyond their own narrow self-interest and incorporates consideration of the common good. However, that we accept human beings’ capacity to make the right decision when they act politically, does not equate to a belief that human beings will always do so. Human beings may make the wrong decision, either because they give preference to their own self-interest over the common good, or because they fail to consider the long-term effects of their decision or its

⁴⁴ Jeremy Waldron, ‘Rights and Majorities: Rousseau Revisited’ in *Liberal Rights* (CUP 1993) 416.

⁴⁵ Waldron (n 8) 417.

⁴⁶ Waldron, ‘Rights-Based Critique of Constitutional Rights’ (1993) 13 *Oxford Journal of Legal Studies* 18, 27.

⁴⁷ Waldron (n 8) 222.

possible effect on others. As such, we may assert that human beings have the capacity to reason morally (a justification for humans' rights-bearing status) and, sometimes, decide badly. Capacity for moral judgment is not inconsistent with moral fallibility. It is not inconsistent to recognise that people often favour their own rights over rights of other people and also recognise them as responsible moral agents. If the evidence points to the conclusion that some people are morally incompetent, does morality in general or the duty to treat people with respect in particular require that we do not believe what our evidence supports?⁴⁸

History shows us the potential in human beings for moral fallibility of majorities: one need only look at certain acts of ethnic cleansing committed in the twentieth century, or the permissibility of slavery in the USA until the late nineteenth century⁴⁹ for sufficient evidence. We have no reason to assume the thesis that the progress of history must lead toward the establishment of a 'universal and homogenous' liberal democratic state, is correct.⁵⁰ It is equally clear that judicial review can strike out morally fallacious law, preventing morally abhorrent popular majoritarian policy from being implemented which prejudices 'discrete and insular minorities'. Before *Brown v Board of Education*,⁵¹ it appears that many Americans believed that racially segregated schools, and the underlying rationale, racial discrimination, were morally permissible: now these are regarded as morally abhorrent, regardless of historical context.

A Kantian moral theory and my pessimistic view of human moral fallibility are not inconsistent. As Sullivan observes: "Kant clearly did not wish to deny that people can and do make wrong moral judgements."⁵² A

⁴⁸ Joseph Raz, 'Disagreement in Politics' (1998) 25 *American Journal of Jurisprudence* 23.

⁴⁹ Slavery was abolished in the USA by the Thirteenth Amendment, ratified in 1865.

⁵⁰ An example of this thesis is found in Francis Fukuyama, *The End of History and the Last of Man* (Free Press 1992). This is not to say that liberal moral and political prescriptions depend upon a conception of progress that actual historical developments have rendered false as John Gray purports. It is only to say we would be unwise to assume that the liberal democratic model that does not contain safeguards against popular opinion will always protect individuals and discrete and insular minorities against prejudicial treatment. See John Gray, *Straw Dogs: Thoughts on Humans and Other Animals* (Granta Books 2002); Glyn Morgan, 'Gray's Elegy for Progress' (2006) 9.2 *Critical Review of International Social and Political Philosophy* 227-241.

⁵¹ [1954] 347 U.S. 483 (This overturned the *Plessy v. Ferguson* [1896] 163 U.S. 537 interpretation of the Fourteenth Amendment that allowed states to establish "separate but equal" education for the black and white races obsolete because significance of schooling had changed).

⁵² Roger J Sullivan, *Immanuel Kant's Moral Theory* (CUP 1989) 58.

plausible reading of Kant's respect for humanity is perfectly consistent with my observation. Kant did not want to deny that it is possible for a person when making moral judgments, to make an 'honest' mistake, without necessarily being an evil person. For example, he holds that errors in general may be due to "a crude and unpracticed" judgment.⁵³ Kant thought that Epicurus, though mistaken in his belief, still merited the judgment of being "virtuous".⁵⁴ He admits, "I can indeed err at times in my objective judgment as to whether something is a duty or not"; and the principles a person of good character adopts "might occasionally be mistaken and imperfect".⁵⁵

There is both a moral effort and epistemological incompetence behind Kant's respect for humanity. We merit this respect because of who we are and what we can become. This is consistent with our epistemological incompetence and moral corruption; whether we should believe that we are depends on evidence rather than our moral capability. The Kantian view, which I hold, is not compromised by this evidence. There is no contradiction in claiming that we human beings are worthy of Kantian respect because of our capacity to act morally, and that we should be distrusted because of what the evidence shows we are likely to do. This observation also holds for rights. We have rights because of our moral capability, what we can become and this is consistent with us being morally fallacious, and thus with using constitutional measures to decrease the dangers rights-bearers are likely to bring about.⁵⁶

When we think about institutional design, we should consider the probability that political institutions will fulfil their functions in accordance with right reason and, if they do not fulfil those functions in this manner, whether a safeguard can be introduced to mitigate error. Given that we think that the interests that rights protect are important, I believe that protecting against risk should be given greater weight than optimism concerning peoples' moral convictions. Thus we should err on the side of vigilance

⁵³ Immanuel Kant, *Critique of Practical Reason* (CUP 1997) 163.

⁵⁴ Immanuel Kant, *Metaphysic of Morals* (CUP 1996) 485.

⁵⁵ *ibid* 401; Immanuel Kant, *Anthropology from a Pragmatic Point of View* (CUP 2006) 292.

⁵⁶ Enoch observes that you may reasonably think that there is a threshold of unintelligence, that sufficiently many people are sufficiently unintelligent that we can no longer claim that people have rights. It is still likely that along the (un)intelligence continuum, danger will arise before the right-bearing threshold is reached: this is insufficient to show that the internal tension Waldron attributes to rights-based defences of judicial review does not really exist. Enoch (n 22) 28-9.

rather than complacency when it comes to designing institutions to uphold rights.

E. WALDRON'S EXAMINATION OF *CAROLENE PRODUCTS* FOOTNOTE FOUR

Waldron, pre-empting the argument I have made (that liberal democratic states will not permanently and unconditionally reflect assumption (α) which is necessary for his core-case to proceed), has tried to limit the applicability of *Carolene Products* footnote four provision.⁵⁷ He recognises that “if taken seriously, ‘discrete’ and ‘insular’ are useful adjectives” because they convey not only the notion of a minority that exists apart from political decision making (a decisional minority) but also a minority that is isolated from the rest of the community, where they do not share many interests with non-members that would enable them to form coalitions to promote their interests (a topical minority).⁵⁸ The alignment of decisional and topical minorities exemplify ‘insularity’ in this sense and Waldron accepts that it is a cause for concern.

Waldron recognises that “[p]ervasive prejudice is certainly incompatible with ... assumption [(α)]” because “it connotes indifference or hostility to the rights of the group’s members, and it may lead members of the majority to differ unreasonably from the minority members’ estimation of their own rights.”⁵⁹ As I have argued, we cannot assume assumption (α) is permanent and unconditional in any state.

In such cases, Waldron himself concedes that his core argument against judicial review cannot be sustained. But this is not equivalent to an argument in favour of judicial review. For Waldron that argument depends on whether judicial majorities are infected with the same prejudice as legislative majorities. If they are, it follows that judicial review of legislation cannot protect minority rights if there is no support at all for them in society. Waldron characterises the response as assuming that respect for the relevant minority’s rights outside the minority’s own membership is largely confined to ‘political elites’. ‘Elite sympathisers’ may be legislators or judges, but elite sympathisers in the judiciary are better able than those in an elected legislature to protect themselves when they protect the rights of an unpopular minority because they need not worry about retaliation by an unsympathetic popular majority, because they are not elected (at least directly) by the popular majority and do not serve fixed terms. So they are

⁵⁷ [1938] 304 US 144 at 152 n 4.

⁵⁸ Waldron (n 4) 1404.

⁵⁹ *ibid.*

more likely to protect the minority. Waldron asserts that if the assumption that sympathy for the minority's rights is strongest among political elites is false, then the argument above falls down.⁶⁰ In my view, the judiciary can be differentiated from voters and the legislature, not because they are more likely to express sympathy for minorities' rights but because they have a professional obligation to be impartial and their decision procedure is limited to the interpretation of pre-determined constitutional rights. They are less likely to follow their own biases because of this constraint, a constraint that distinguishes them both from the voting citizen and the 'trustee' legislator. Waldron underestimates the significance placed upon the independence, neutrality and impartiality of judiciaries in liberal democratic states.

Disagreement about what the Constitution means might lead towards deferential rulings that gives the legislature the benefit of the doubt, but a court must sometimes stand ready to enforce the Constitution in the face of disagreement. Reasonable disagreement ought not prevent a court from applying a superior constitutional law over an inferior piece of legislation, when they clearly conflict, to ensure citizens are treated with equal concern and respect by legislative provisions.

F. CONCLUSION

Political institutions should be designed so that they are likely to make political decisions in accordance with right reason. A given statement is not true by virtue of the number of people who believe it to be true. Thus, minorities should be protected from possible tyrannical majorities. Waldron contends that fundamental rights are a reflection of human beings' moral status and autonomy and that, accordingly, constitutionally entrenching them to protect 'discrete and insular minorities' suggests that human beings are not worthy of these rights we wish to protect. I riposte that human beings' capability for moral reasoning does not necessarily infer that they are always morally responsible. This assertion is epistemological rather than moral: the evidence suggests we should be pessimistic about the likelihood that, even in liberal democratic states, most members of society and most of its officials will *always* be committed to the idea of individual and minority rights. So Waldron is mistaken in assuming that *Carolene Products* footnote four provision⁶¹ will never apply to states which are, at present, 'liberal democracies'. It is plausible that judges will be infected by the same biases

⁶⁰ *ibid* 1404-5.

⁶¹ [1938] 304 US 144, 152 n 4.

as the rest of the population, but judges' biases are less likely to be reflected in their decisions because of their professional obligation to be impartial and because they are constrained by their interpretation of constitutionally entrenched rights. Thus, following Kavanagh's proposition that "the institutional design that is most likely to yield morally right decisions, or is likely to yield the most morally right decision, is most justified",⁶² I believe that we should wager for judicial review of legislation.

⁶² Kavanagh (n 15) 460.