REVIEW ESSAY

DISAGREEMENT AND AN AUSTRALIAN BILL OF RIGHTS

Law and Disagreement by Jeremy Waldron (Oxford: Clarendon Press, 1999) pages i–ix, 1–332. Price A$210.00 (hardcover) ISBN 0 19 826213 2; A$75.00 (softcover) ISBN 0 19 924303 4.

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I INTRODUCTION

In *Law and Disagreement*[1] Jeremy Waldron seeks to address what he perceives to be the over-attention of legal theory to the workings of courts and its corresponding inattention to the details of the legislative process. The first part of the book is devoted to a 'jurisprudence of legislation', that is, to a philosophical consideration of the nature of legislatures and the source of their authority. Waldron turns to the more traditional jurisprudential concern with courts in the final part of his book, which is devoted to judicial review (using the term in the American sense to refer to the judicial practice of overruling laws pursuant to a written constitution, especially a constitutional bill of rights).

A distinctive feature of Waldron's work is that he seeks to place the existence of disagreement among members of society at the centre of his theory. His attention to disagreement leads him to oppose a number of widely accepted ideas

[1] Jeremy Waldron, *Law and Disagreement* (1999).

about courts and legislatures. Waldron resists the common scepticism about legislatures and seeks to rehabilitate their position in legal theory.[2] Conversely, Waldron opposes what he believes to be an unduly romantic image of courts as forums of principled deliberation.[3] These basic positions ultimately lead Waldron to a number of controversial conclusions, in particular, an extreme version of textualism in legislative interpretation[4] and a strong opposition to bills of rights.[5]

These are familiar positions in Australia and elsewhere.[6] However, Waldron's arguments are challenging and original.[7] His motivating concern is to deal respectfully with disagreement and to respond sensitively to the diverse nature of modern democracies. Thus, although the book represents a major challenge to the work of liberal political and legal philosophers of the 20th century, Waldron writes within the liberal tradition.[8] His favourite targets are Ronald Dworkin and John Rawls,[9] yet Waldron is motivated by the same kinds of concern for equality, tolerance and respect for the individual that distinguish their theories. Waldron's power to draw unexpected conclusions from widely-shared premises makes for fascinating reading.

In this review, I will focus on Waldron's opposition to bills of rights, a theme appropriate for this symposium. It is also peculiarly pertinent in Australia, which is alone among western democracies in having neither comprehensive constitutional protection of rights nor any quasi-constitutional document like the *Human Rights Act 1998* (UK) c 42. In Australia, therefore, the question whether to adopt a bill of rights remains a live political issue.[10]

2 Ibid 32.

3 Ibid 31–2.

4 Ibid ch 6. For a critique of Waldron's textualism, see Jeffrey Goldsworthy, 'Legislation, Interpretation, and Judicial Review' (2001) 51 *University of Toronto Law Journal* 75.

5 Waldron, *Law and Disagreement*, above n 1, chs 10–13.

6 Justice Scalia of the United States Supreme Court is perhaps the best known advocate of textualism in statutory interpretation. See Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997). For other (also interesting) critiques of bills of rights, see Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) and, for critiques not confined to the United States Bill of Rights, see Tom Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (2001); James Allan, 'Take Heed Australia — A Statutory Bill of Rights and Its Inflationary Effect' (2001) 6 *Deakin Law Review* 322.

7 Jeffrey Goldsworthy expresses a widely held view when he describes Waldron as 'one of the most brilliant political and legal philosophers writing in English today': Goldsworthy, above n 4, 75.

8 Elsewhere, Waldron describes the tradition of liberal political theory within which he writes:

> It is a heritage which prizes individuality, which requires social and political power to justify itself at the tribunal of the people's interests as they themselves conceive them, and which ... insists, in Mill's words, that '[h]uman nature is not a machine to be built after a model' and it is 'the privilege and proper condition of a human being ... to use and interpret the experience [of his community] in his own way'.

Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (1993) 1–2.

9 See, eg, Waldron, *Law and Disagreement*, above n 1, ch 7 (a critique of Rawls' political theory); ch 13 (a critique of Dworkin's argument for a bill of rights).

10 For example, the government of the Australian Capital Territory has recently established the Bill of Rights Consultative Committee, chaired by Professor Hilary Charlesworth, to consider the adoption of a bill of rights for the ACT: see John Stanhope, 'Bill of Rights Terms of Reference' (Press Release, 3 April 2002). The adoption of an Australian Charter of Rights and Freedoms is official policy of the Australian Democrats: Australian Democrats, *Constitutional Matters: An*

II AGAINST BILLS OF RIGHTS

A *Rights and Bills of Rights*

Waldron's method of argument is meticulous. With a philosopher's precision he exposes unarticulated assumptions, inappropriate analogies and false distinctions. In this vein, he begins his case against bills of rights by distinguishing between a commitment to rights and a commitment to bills of rights. His underlying irritation is that:

> I find that people take it for granted that enthusiasm for [a constitutional bill of rights] is shared by any philosopher whose moral theory or normative theory of justice is organized around the idea of rights. Surely, it is said, anyone who believes in rights will welcome a proposal to institutionalize a Bill of Rights and give the courts power to strike down legislation that encroaches on basic liberties.[11]

Waldron shows that the link between the idea of rights and constitutional rights can be broken at several points. He argues, first, that a fundamental commitment to individual rights need not necessarily result in the derivation of a range of more concrete rights (such as protection of freedom of speech, freedom of religion etc) as normative recommendations,[12] and second, that even where it does so, there is nothing in the recognition of those moral rights that *necessarily* leads to the recognition of legal rights.[13]

Third, and most pertinently for constitutional reformers, Waldron makes the point that even a commitment to the position that an individual should have a *legal* right to something does not establish that the legal right should be a *constitutional* right.[14] Constitutional rights, enforced by judges and immune from change by ordinary legislative procedures, can only be justified by arguments that address the nature of that particular institutional arrangement and its alternatives. In the remainder of his book Waldron addresses that concern, arguing against the adoption of a bill of rights. His argument, to which I now turn, is built on scepticism about courts as well as enthusiasm for, and confidence in, legislatures.

Australian Charter of Rights and Freedoms (2001) <http://www.democrats.org.au/policies/> at 10 July 2002.

11 Waldron, *Law and Disagreement*, above n 1, 212.

12 Ibid 216. A 'rights-based' theory can lead to normative recommendations, like John Rawls' 'difference principle', which are not formulated in terms of rights at all. Conversely, Waldron also points to arguments that a non-rights-based theory, like utilitarianism, could lead to a commitment to some kind of rights 'at the surface': at 216. Thus he concludes, 'we cannot infer much about the practical recommendations of a normative theory from the character of its fundamental premises': at 216–17. Rawls' difference principle allows unequal distribution of wealth and income only if it operates to the benefit of the least advantaged members of society: John Rawls, *A Theory of Justice* (1972) 75–80.

13 Waldron, *Law and Disagreement*, above n 1, 217–18.

14 Ibid 219–21.

B *Scepticism about Courts: Rights and Controversy*

Waldron grounds his scepticism in the nature of disputes about rights. He is highly sensitive to the controversial nature of rights, an insight he draws from philosophical debate.

The idea of rights may have the appearance of simplicity. After all, the invocation of a right is supposed to halt complex, utilitarian analyses with the 'trump' — the fundamental value that is not subjected to the cost–benefit analysis of ordinary decision-making.[15] The reality, however, is that rights are the subject of intense philosophical controversy. Philosophical disagreements proliferate over such things as which interests should be identified as rights, the terms in which they are identified, the proper balance with other social considerations, the forms of duty and their moral priority, and who the rights-bearers should be.[16] These kinds of disputes arise also in 'real world' political deliberation.[17] Indeed, Waldron specifically contends that disagreements in politics resemble disagreements in philosophy. Just like philosophers, citizens involved in political disagreements have to engage 'in hard thinking about what is just and what rights people have ... Political philosophy ... is simply conscientious civic discussion without a deadline.'[18]

In Waldron's view, this controversy over rights undermines the legitimacy of judicial review.[19] When decisions about rights are handed over to the judiciary, it is not a matter of giving the judiciary power to protect some value on which we all agree. Even if we can all agree upon some list of rights to be protected in a bill of rights, there will be controversies about the meaning of rights in specific circumstances. Precisely because of these controversies, bills of rights are expressed in general terms. Thus, judges are left with the difficult and controversial task of deciding what rights mean in concrete circumstances and weighing them against other rights, as well as other kinds of interests. Waldron's position is that because these questions about rights are not susceptible to easy answers, and because there is no authoritative way to choose among competing answers to such questions, the resolution of a rights issue by a judge can only be characterised as the judge imposing his or her opinion on the matter.[20]

This kind of argument is sometimes associated with a belief that there *are* no right answers to such questions. In other words, one reason to oppose the capacity of judges to decide matters of rights is that the moral questions raised[21]

[15] Ibid 245–6. Waldron is alluding to Ronald Dworkin's theory of rights: see Ronald Dworkin 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (1984) 153. See also Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002) 38–9.

[16] Waldron, *Law and Disagreement*, above n 1, 225–6.

[17] Ibid 228.

[18] Ibid 229.

[19] Ibid 181.

[20] Ibid.

[21] As Michael Moore points out, bills of rights seem to invite moral reasoning with the use of phrases like 'due process', 'equal protection', 'free exercise of religion' and 'cruel and unusual punishment': Michael Moore, 'Moral Reality Revisited' (1992) 90 *Michigan Law Review* 2424, 2469.

have no right answers and judges, therefore, have no better capacity than anyone else to answer them.[22] To put the point in more philosophical terms, opposition to moral realism (the theory that moral questions have objectively right and wrong answers) is sometimes associated with opposition to judicial review. However, Waldron is careful to distinguish his theory from this position. In the course of his argument it becomes clear that he adheres to 'emotivism',[23] a theory that opposes the idea of objective moral truth. Yet he does not rely on emotivism to justify his opposition to judicial review. Rather than seeking to show that moral realism is wrong, Waldron argues that its truth is *irrelevant* to questions about judicial review.

His point is that neither philosophers nor anyone else have any agreed method for determining the right answers to such questions, making moral disputes essentially intractable. Waldron draws a contrast with science:

> at least in mainstream science, there is a broad conception of method acknowledged by a large group of practitioners, all of whom regard that acknowledgement as something independent of the scientific disagreements they have with one another. ... *Among moralists there is nothing remotely comparable.* Instead each view comes along trailing its own theory of what counts as a justification ... unlike their counterparts in the scientific community, they share virtually nothing in the way of an epistemology or a method with which these disagreements might in principle be approached.[24]

The impossibility of resolving moral disagreements in a manner that can satisfy disagreeing parties undermines the legitimacy of judicial review:

> Even if scepticism is rejected, even if there *are* moral facts which make true judgements true and false judgements false, still the best a judge can do is to impose his *opinion* about such facts on the 'hapless litigants' who come before him.[25]

C *Reasonable Disagreement and Respect*

So far, I have outlined what Waldron takes to be the 'circumstances of politics':[26] the need to make decisions in the face of intractable, pervasive disagree-

[22] Waldron points to Moore's argument that '[i]f one's daily task is to impose values on others, to think that these are only one's own personal values doubtlessly makes the job hard to perform at all. To foist personal values onto hapless litigants is not for many temperaments a satisfying role': Michael Moore, 'Moral Reality' [1982] *Wisconsin Law Review* 1061, 1064, cited in Waldron, *Law and Disagreement*, above n 1, 181.

[23] 'Emotivism is the theory that moral terms are used to express and evoke emotions, rather than primarily to convey information': Waldron, *Law and Disagreement*, above n 1, 172. See also Jeremy Waldron, 'Moral Truth and Judicial Review' (1998) 43 *American Journal of Jurisprudence* 75.

[24] Waldron, *Law and Disagreement*, above n 1, 178 (emphasis in original). Waldron's invocation of the scientific method may seem naive to some philosophers of science. He does, however, attempt to address the complexities of this method: at ch 8.

[25] Ibid 181 (emphasis in original).

[26] Ibid 102. Waldron's notion of 'the circumstances of politics' is an adaptation of Rawls' idea of 'the circumstances of justice': see Rawls, above n 12, 126–30. As Waldron explains:

> The circumstances of justice are those aspects of the human condition, such as moderate scarcity and the limited altruism of individuals, which make justice as a virtue and a practice both possible and necessary. We may say, along similar lines, that the felt need among the members

ment. Another key feature of his argument is his characterisation of those disputes as reasonable.

This part of Waldron's theory is based on his most fundamental philosophical commitments. His objection to constitutional rights is a 'rights-based' objection[27] that relies on his conception of the individual as a rights-holder:

> The idea of rights is based on a view of the human individual as essentially a thinking agent, endowed with an ability to deliberate morally, to see things from others' points of view, and to transcend a preoccupation with his own particular or sectional interests. The attribution of any right ... is typically an act of faith in the agency and capacity for moral thinking of each of the individuals concerned.[28]

Thinking of individuals in this way should lead us, Waldron says, to reassess the cynical attitudes towards voters that are a common part of our politics. On the contrary, if we are serious about treating our fellow citizens with the respect due to them as rights-holders, we should treat their views with some respect, even when we think they are wrong.[29]

A central part of Waldron's argument is that bills of rights do not demonstrate the respect for individuals that a serious rights-theorist should want. Transferring decision-making power out of the legislature to the judiciary exhibits a mistrust of the citizens who vote for and participate in the Parliament,[30] which sits quite uncomfortably with the concept of the individual as a rights-holder. Above all, it is disrespectful of disagreements that we should understand as reasonable. Legislative procedure, by contrast, is more respectful of differences of opinion.

In an earlier part of the book,[31] Waldron argues that the authority of legislatures lies in the respect that legislative decisions show for the individuals represented there. Legislation represents (and purports to represent) who won, not who was right. It respects 'differences of opinion about justice and the common good: it does not require anyone's sincerely held view to be played down or hushed up because of the fancied importance of consensus.'[32] Thus legislative procedure 'embodies a principle of respect for each person in the processes by which we settle on a view to be adopted as *ours* even in the face of disagreement.'[33]

> of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are the circumstances of politics.
>
> At 102 (emphasis in original) (citations omitted).

27 It was first developed in his well-known article: Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

28 Waldron, *Law and Disagreement*, above n 1, 250. See also at 222.

29 Ibid 229–30.

30 Ibid 222.

31 Ibid 108–13.

32 Ibid 109.

33 Ibid (emphasis in original).

D *The Right of Participation*

The final step in Waldron's argument is also 'rights-based'. His most fundamental objection to judicial review is that it compromises the right of all individuals to have a share in decisions that affect them. Therefore he argues for the primacy of the right of participation in political decision-making[34] as the 'right of rights'.[35]

At first sight, this seems like a familiar objection that attracts familiar answers. One obvious argument against Waldron's view points to the values underlying the right of participation and to the imperfection of majoritarian politics. The argument is that the point of giving citizens an equal share in decisions that affect them is to make sure that individuals are treated with equal concern and respect. There is the possibility, however, that majorities will use their right of participation to deny minorities the equal concern and respect that is their due. Thus, the right of participation can be limited when citizens are likely to use that right to override the values on which it is based.

Waldron's objection to judicial review is designed to withstand this kind of answer. Importantly, he rejects 'instrumentalist' justifications for the right of participation (arguments that political participation is valuable because it is likely to lead us to good or right decisions).[36] Waldron thus avoids arguments, like that just mentioned, which would allow participation to be abandoned where it does not achieve the ends it purports to serve.

For Waldron, the problem with an instrumentalist argument for the right of participation is that it presupposes that we can know and agree upon what good results are, a position that flies in the face of the 'circumstances of politics'.[37] Without agreement about what good results of the political process would be, decisions about process cannot be made by reference to the likely substantive results. The results are precisely what are in dispute.[38]

This problem bedevils even more modest claims. It might be said that, even if we have no clear idea of what the best answers to questions about rights would be, we can be confident that we will not get the best answers from a legislature which is prone to self-interested and unprincipled decision-making.[39] Waldron

[34] By the right of participation, Waldron is referring to the demand that the popular element in government should be decisive: ibid 235. A right of participation can be exercised by citizens voting in a system of representative government. Waldron does not mean to refer to a directly participatory democracy.

[35] Ibid 232, quoting William Cobbett, *Advice to Young Men and (Incidentally) to Young Women in the Middle and Higher Ranks of Life in a Series of Letters Addressed to a Youth, a Bachelor, a Lover, a Husband, a Father, and a Citizen or a Subject* (first published 1830, 1980 ed) 317.

[36] Waldron also considers and rejects 'expressivist' justifications for voting: Waldron, *Law and Disagreement*, above n 1, 239–43.

[37] See above n 26.

[38] Waldron, *Law and Disagreement*, above n 1, 253:

> rights-instrumentalism seems to face the difficulty that it presupposes our possession of the truth about rights in designing an authoritative procedure whose point it is to settle that very issue. ... There seems, then, something question-begging about using rights-instrumentalism as a basis for the design of political procedures among people who disagree on issues such as this.

[39] Ibid.

dismisses this argument by pointing to competing 'epistemic precepts' about which institution best makes these decisions.[40]

This point is important for Waldron. It addresses a very common argument in favour of judicial review. It is often said that, whatever else we think about rights, at least we should agree that the disinterestedness of judicial reasoning is a preferable way of deciding these issues, especially when we remember that the alternative is the barely concealed self-interest of elected officials. Waldron challenges that very assumption by pointing to other ideas about how rights issues are best resolved. On some views, 'decisions about rights are best taken by those who have a sufficient stake in the matter to decide responsibly'; for others, 'the very idea of natural rights celebrates the ability of ordinary people to reason responsibly about the relation between their own interests and those of others'; for others still, the truth about rights requires the wisdom of a scholar (even a moral philosopher); and still others hold the contrary view, that 'academic casuistry distorts clear thinking on these matters'.[41] Thus, he concludes:

> People disagree about rights; *they also disagree about the best way to reason about rights*; so they simply cannot in their collective capacity follow the instruction 'Confer the authority to resolve these disagreements on those persons and procedures most likely to yield the right answer' in a non-question-begging way.[42]

The right of participation requires, then, that 'right-bearers have the right to resolve disagreements about what rights they have among themselves and on roughly equal terms'.[43] That right cannot be sacrificed in the belief that better substantive decisions will result from some other form of decision-making.

III The Major Counterargument — Rights and Democracy

By now, I imagine the reader's head is swarming with objections to Waldron's argument. First among these, I suspect, will be the concern that his majoritarian, proceduralist concept of democracy ignores arguments that non-majoritarian protection of rights can be regarded as part of a more substantive idea of democracy. Waldron turns to these kinds of arguments in his final two chapters.

Waldron quickly disposes of the argument that constitutional rights would be entirely compatible with democracy if adopted by democratic means. With his knack for the convincing example, Waldron points out that '[i]f the people voted to experiment with dictatorship, democratic principles might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic.'[44] Thus, a democratic procedure for adopting some institution of government does not in itself make that institution democratic. Waldron then moves on to consider two more substantial arguments made against his position.

[40] Ibid 253.
[41] Ibid.
[42] Ibid 254 (emphasis added).
[43] Ibid.
[44] Ibid 255.

A *The 'Precommitment' Argument*

Under the first argument, constitutional rights are to be regarded as a form of 'precommitment'. They are mechanisms put in place by a rational people who are aware that, from time to time, they may depart from what in cooler moments they recognise to be the right path. The argument is that because people recognise their failings they would agree to certain limits upon majoritarian processes that would protect the equal basic rights of individuals.[45] An analogy is sometimes drawn with Ulysses' attempt to resist the sirens by having his sailors tie him to the mast and promise not to release him (even to tighten his bonds) when he begs to be cut down; or more prosaically, with the drinker who at the beginning of a party gives car keys to a friend with strict instructions not to return them.[46] These are attempts by rational individuals, aware of their weaknesses, to put in place mechanisms to protect themselves.

This argument is potentially a serious objection to Waldron's thesis because it supposes, as Waldron insists we must, that people are rational beings capable of making decisions for themselves. Waldron, however, rejects the analogy on which the argument relies, with the now familiar theme of disagreement.

The position of a people deciding on matters of rights cannot, he says, be equated with Ulysses' predicament or the drinker's attempt to avoid driving. The people in a democratic state, considering the nature of their rights, are not fluctuating between moments of clear-sightedness and moments of irrationality. On the contrary, they are enmeshed in ongoing rational disagreement. The people are not in a position where they *know* what the right answers are now, and need to be protected against subsequent moments of irrationality. Instead, *rational* disagreements will persist on what fairly abstract formulations of rights amount to in concrete cases. Thus, under a constitutional bill of rights, the role of the judiciary is not one of enforcing a precommitment to rights but of deciding what those rights mean and precisely what they entail.[47]

B *Rights as an Aspect of Democracy*

Finally, Waldron considers the commonly held view that the constitutional protection of rights can secure democratic government by protecting those rights that are part of the concept of democracy itself. Hilary Charlesworth, in criticising purely procedural concepts of democracy, puts the argument this way: 'A richer understanding of democracy involves acknowledging that there are some

[45] Ibid 257–60. For earlier essays considering this dispute, see Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 326 and Jeremy Waldron, 'Freeman's Defense of Judicial Review' (1994) 13 *Law and Philosophy* 27. Both essays are reproduced in Tom Campbell and Adrienne Stone (eds), *Law and Democracy* (forthcoming 2002) and discussed in Tom Campbell and Adrienne Stone, 'Introduction: Bringing Law and Democracy Together' in Tom Campbell and Adrienne Stone (eds), *Law and Democracy* (forthcoming 2002).

[46] Waldron, *Law and Disagreement*, above n 1, 259.

[47] Ibid 268.

rights that are so basic to human dignity that they should be taken out of the political arena and given special protection.'[48]

The strongest version of the argument is that democracy actually requires that some rights be put beyond the control of the majority. However, Waldron confines himself to the weaker form of the argument (which asserts only that judicial review of rights is compatible with democracy), believing he can rebut even its more modest claims. He addresses the argument as put by Ronald Dworkin and also refers to (though does not consider in detail) a version developed by John Hart Ely that has been extremely influential in American constitutional theory.[49]

Ely's argument focuses on process, arguing that the rights entrenched in the *United States Constitution* protect democratic processes by preventing democratic 'malfunctions' that entrench the powerful or disregard minorities.[50] Dworkin goes a little further, arguing also for the protection of rights with 'no procedural aspect.'[51] Dworkin insists, for example, that society must not dictate the individual's fundamental ethical convictions.[52] These rights are necessary, as Waldron puts it, for the 'legitimacy or moral respectability of democratic decision-making'.[53] Together, Waldron calls these 'rights associated with democracy'.[54] The argument against him is that, where judges interpret rights associated with democracy, their action is not undemocratic but part of the democratic process itself.

Waldron is actually more sympathetic to Dworkin's extended form of the argument, but he believes both ultimately fail.[55] His objection to the argument relies on a distinction between the subject of a judge's inquiry and the nature of the decision-making process. The fact that a judge is making a decision *about* a democratic right does not, he argues, establish that the decision is compatible with democracy.[56] On the contrary, judicial review always incurs some kind of democratic cost because the decision has been made by non-democratic means. If a court makes a good decision about a democratic right, there is some substantive gain for democracy to set off against that loss.[57] Where a court makes a bad decision, however, then there is both a substantive and a procedural cost for democracy.

48 Charlesworth, above n 15, 39.

49 Waldron, *Law and Disagreement*, above n 1, ch 13.

50 Thus, some rights (like freedom of speech) operate to ensure an effective process of representation by preventing those in power from keeping others out, and other rights (like equal protection) protect minorities likely to be disregarded by the majority. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 102–4.

51 Waldron, *Law and Disagreement*, above n 1, 283. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) 25.

52 Dworkin, above n 51, 25–6, cited in Waldron, *Law and Disagreement*, above n 1, 284.

53 Waldron, *Law and Disagreement*, above n 1, 283.

54 Ibid 284.

55 Ibid 285.

56 Ibid 294.

57 Ibid 293.

Consequently, Waldron argues that any democratic gain that results from giving judges power to interpret rights associated with democracy must be set off against the procedural cost.[58] In this light, courts would only be attractive forums for determinations of questions about democratic rights if we could rely on them to produce some substantive democratic gain to set off against those inevitable procedural costs. However, the proposition that judges are the best decision-makers about questions of rights is, of course, the very proposition Waldron has been denying all along. The kind of disagreement that prevents the authoritative judicial resolution of rights issues in general extends to questions about rights and democracy. There will be disagreement about which rights are necessary for the protection of democracy and, even where there is agreement on abstract formulations of those rights, there will be disagreement on their concrete implications. As we have no basis for resolving these disputes, we have no basis for preferring the judicial resolution of them.

That leaves us with legislatures. The converse of Waldron's argument is that legislatures will always provide a democratic process, even if we are unsure about the nature of the results they reach:

> If an institution which *is* elected and accountable makes the wrong decision about what democracy requires, then although there is a loss to democracy in the substance of the decision, it is not silly for citizens to comfort themselves with the thought that at least they made their *own* mistake about democracy.[59]

This provides certainty of a democratic process only, but that turns out to be the only certainty we can hope for in 'the circumstances of politics'.

IV COMMENT

Waldron's argument has two essential features: a critique of the capacity of courts to resolve rights questions and a corresponding enthusiasm for legislatures. I will make some comments on each of these and then consider special issues that arise in the Australian context.

A *Critique of Courts*

At the heart of Waldron's argument is the concept of disagreement. He is at his most convincing in using this concept to demonstrate the complexity of concepts of rights, and thus in mounting a provocative challenge to the traditional reasons for entrusting these issues to courts. He shows that, in the face of disagreement about the meaning of abstract moral principles, we cannot simply assume that the 'principled' deliberation of judges (in the relative calm of courts, free from the pressures of electoral politics) is more likely to produce good answers to such complex and disputed questions.[60] Without some way of agreeing upon the results, that kind of argument begs the question.

[58] Ibid 295–6.

[59] Ibid 293–4 (emphasis in original).

[60] Jeremy Kirk summarises these arguments in Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19, 22–3.

One way to answer Waldron would be to attack the idea of disagreement that lies at the root of his theory. That is, his argument would fail if it could be shown that the kinds of questions posed by a bill of rights have 'right' answers that judges can reliably determine. I will now consider a legal and a philosophical attempt to do this.

B *Disagreement and Legal Interpretation*

One answer to the problem of disagreement relies on the interpretive resources available to judges. Such resources include the text and the structure of the bill of rights and the constitution within which it sits, the original intention of the framers or original meaning of the relevant provisions and any relevant judicial decisions. The argument would be that where judges rely on these resources they do not make an unconstrained 'moral' judgment about the meaning of an abstract concept like 'equality' or 'freedom of speech' but a constrained 'legal' judgment.

I do not think that this is a very promising line of argument and, perhaps because of that, Waldron does not really address it. However, it is worth considering how Waldron might respond as it reveals how his argument about bills of rights is related to his theory of statutory interpretation outlined earlier in the book.

Presumably Waldron's first response would be that the text, alone, does little to constrain judges. That is not a very controversial position. The limits of textual analysis are widely accepted and, of course, textual indeterminacy is greater in the case of the type of language likely to be used in bills of rights than in most other kinds of legal language.[61]

At first glance, however, that point would seem inconsistent with his textualist theory of statutory interpretation. Waldron's theory allows reference only to the text on which a legislature ultimately settles and excludes reference to evidence of legislative intention. Nonetheless, the two positions can be reconciled. Waldron's textualism does not reflect a strong belief in the power of text to resolve questions of interpretation. Rather, his argument relies, once again, on disagreement. In short, Waldron's position is that, in a 'large multi-member assembly comprising hundreds of persons with diverse views, affiliations and allegiances',[62] members have 'very little in the way of shared cultural and social understandings ... beyond the rather stiff and formal language that they address to one another in their legislative debates.'[63] Waldron argues that there can be no reliance on shared understandings and presumed intention. All that the legislators can be said to have agreed upon is the text that their deliberation produces — '[t]here simply is no fact of the matter concerning a legislature's intentions apart from the formal specification of the act it has performed.'[64]

[61] See Ely, above n 50.
[62] Waldron, *Law and Disagreement*, above n 1, 142.
[63] Ibid 123.
[64] Ibid 142.

Of course, Waldron must defend his argument against very strong claims of textual indeterminacy. His position, though, is moderate and, importantly for the argument I have just made, admits of some linguistic indeterminacy: 'natural language ... appears to offer some assistance (though it is, as we all know, *limited* assistance) in regard to things like deliberative determinacy.'[65]

Waldron's theory of statutory interpretation is thus consistent with a rejection of text as a response to interpretive indeterminacy. It also suggests a likely approach to reliance on historical meaning, or original intention, to interpret a bill of rights. Waldron's objections to the use of legislative deliberations (in American terms, 'legislative history') or other evidence of statutory interpretation would extend, presumably, to a bill of rights formulated in similar circumstances. On Waldron's theory, if a large, diverse, deliberative body adopted a bill of rights, only the text of that enactment would reliably reflect intention. Thus he would encourage interpreters of constitutional text to eschew reference to extrinsic evidence of original intent or meaning.

That position is likely to be more controversial as it depends on Waldron's theory of statutory interpretation.[66] Both William Eskridge and Jeffrey Goldsworthy have criticised this aspect of Waldron's theory, arguing that he overemphasises the diversity of legislatures.[67] If legislatures are typically far more homogenous than Waldron suggests then legislators might share understandings about the meaning of text, which could be found in at least some kinds of extrinsic evidence.[68]

However, even if Waldron is wrong and statutes and bills of rights can, and should, be interpreted by reference to extrinsic evidence of intention, his argument against bills of rights would remain relatively unscathed. Apart from anything else, even with the assistance of originalism, a judge is unlikely to avoid all of the questions that Waldron objects to them deciding. Consequently, at best, originalism would weaken, rather than destroy, the case against a bill of rights. Further, there are *originalist* arguments that cast judges as the interpreters of abstract moral principle, in just the manner to which Waldron objects.[69]

Neither the claims of textualism or originalism are likely, therefore, to destroy Waldron's case against a bill of rights. That leaves the claims of precedent about which Waldron says nothing at all. Waldron's answer would, I think, be that he objects to judges having the last word, even if judicial rulings solidify into rules of predictable application. He need not, therefore, deny the constraining power of precedent on any particular judge. Instead, he would argue that where a judge is applying or extending some rule developed by other judges, the interpretation

[65] Ibid 83 (emphasis in original) (citations omitted).

[66] See Goldsworthy, above n 4, 82–6; William Eskridge Jr, 'Book Review Essay — The Circumstances of Politics and the Application of Statutes' (2000) 100 *Columbia Law Review* 558.

[67] Goldsworthy, above n 4, 83–5; Eskridge, above n 66, 579–80.

[68] Goldsworthy, above n 4, 85.

[69] Ronald Dworkin's argument about the rights provisions of the *United States Constitution* is a case in point. Dworkin argues that these provisions should not be interpreted by reference to what the framers (or anyone else at the time) thought that they meant. On the contrary, these provisions were *intended* to embody abstract moral principles that would be interpreted in accordance with the moral judgments of the judiciary. See Dworkin, above n 51.

still involves the imposition of the opinion of some judge or group of judges. The critical point for his argument would remain: an abstract moral principle has been given content by the judiciary to the exclusion of the arm of government in which the people participate.

For these reasons, I think that Waldron's argument survives any attempt to rely on the capacity of traditional legal methodology to constrain judges. However, it is true that Waldron does not put much emphasis on the incremental, case by case manner in which a bill of rights is likely to be interpreted. That may expose him to another kind of criticism. William Eskridge argues that Waldron has

> an excessively grand understanding of judicial review ... Constitutional rights ... come on little cat's feet, with ample opportunity for political feedback. It took several generations of Supreme Court decisions for the Court to take a strong and potentially sweeping stand against apartheid, for example.[70]

The idea of judicial review as part of a 'conversation' between a court and a parliament is a particularly prominent part of the Canadian debate on judicial review[71] (where the Parliament has power to override the *Canadian Charter of Rights and Freedoms*).[72] Significantly, however, the idea that political reality limits the effect of judicial review is also a part of American analyses of judicial review, which are directed to fully entrenched bills of rights. Robert McCloskey's well-known account of the US Supreme Court concludes that the Court has always been reluctant to stray too far from mainstream public opinion.[73] Arguments like these might allow the possibility that Waldron's fears about judicial review are exaggerated. So, Eskridge concludes:

> As the proverbial 'least dangerous branch,' the US Supreme Court cannot prevail against popular outrage or even political resistance by the other branches. The Court has been most effective in slowing down rash or aberrant legislative actions, either through cautious judicial review or restrictive statutory interpretations, rather than turning the tide of politics; the Court almost never challenges a national political equilibrium. Waldron's case against judicial review exaggerates its bite, at least in the American experience.[74]

That kind of claim cannot be resolved in the abstract and would require a historical or empirical study that space here precludes. In any event, it is not at all clear to me that it defeats the argument against a bill of rights. At the very least, this point seems to cut both ways. If judicial review is a less important phenomenon than Waldron suggests then perhaps there is less reason to oppose it. Equally, however, there is less reason to favour it because, if the judiciary is constrained

[70] Eskridge, above n 66, 579 (citations omitted).

[71] Peter Hogg and Allison Bushell, 'The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75, 105.

[72] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 ('*Charter*') s 33. See discussion below Part IV(E).

[73] Robert McCloskey, *The American Supreme Court* (2nd ed, 1994). See also Rosenberg, above n 6, who argues that the power of the US Supreme Court to bring about social change has been overstated.

[74] Eskridge, above n 66, 579 (citations omitted).

by politics, then it is less able to fulfill the function that advocates of judicial review celebrate: the protection of minorities from majoritarian decisions that violate their rights.

C *Disagreement and Moral Realism*

Perhaps a more promising line of attack is to challenge the philosophical basis of Waldron's conclusion that rights are the subject of inevitable disagreement. That is the nature of the debate between Waldron and the legal philosopher Michael Moore. As a moral realist,[75] Moore believes that a judge *could* reach an objectively correct (and therefore not arbitrary) answer to a question about rights.[76] Further, and critically, Moore also argues that judges are likely to be good moral reasoners:

> First, judges are better positioned for this kind of moral insight because every day they face moral thought experiments with the kind of detail and concrete personal involvement needed for moral insight. ... Second, judicial reasoning is like moral reasoning in its focus on principled generality, so that judges might have an advantage even at the most abstract level. ... Third, the institutional features of judicial office — notably job security — make judges better able to focus their deliberations on the moral aspect of any problem, putting aside the questions of political expediency with which legislators must grapple. ... Finally, the judicial temperament may be more suited to assessing moral questions than the legislature temperament. ... Evenhandedness, freedom from bias, prejudgment, and neutrality are the distinctively judicial virtues. They are also the virtues of the 'ideal observer' in moral theory ...[77]

Of course, Waldron's reply focuses on the kind of 'epistemic' disagreements referred to above.[78] He denies that judges have moral expertise,[79] pointing to disagreement about what constitutes good moral reasoning:

> There are *two* levels of disputes, a first-level dispute about rights ... and a second-level dispute about the proper way to settle political disagreements ... moral realism can provide us with a way of characterizing the disagreements that are the essence of politics. But moral realism cannot provide us with a politically practicable way of settling those disagreements.[80]

The debate continues. Moore is confident that moral realism can produce a sufficient epistemology to identify the right answer to moral questions,[81] which Waldron, in turn, denies.[82]

I cannot, of course, hope to resolve this debate here. What it demonstrates, for our purpose, is that questions of judicial capacity are central to justifications for

[75] That is, he ascribes to the metaethical theory that moral statements are statements of fact that are either true or false.
[76] Moore, 'Moral Reality Revisited', above n 21, 2477.
[77] Ibid.
[78] See text accompanying above n 41.
[79] Waldron, 'Moral Truth and Judicial Review', above n 23, 84–8.
[80] Ibid 81–2 (emphasis in original).
[81] Moore, 'Moral Reality Revisited', above n 21, 2479–80.
[82] Waldron, 'Moral Truth and Judicial Review', above n 23, 88.

judicial review. Moreover, the easy arguments in favour of courts are insufficient. This debate, therefore, forces the constitutional reformer to reconsider the often casual assertion that courts are better institutions for the making of decisions about rights. Perhaps, as lawyers, we are naturally inclined to believe that judicial reasoning is superior. Waldron shows us that we must do better. At the very least, he requires that advocates of judicial review address the issue more clearly.

D *A Rosy Picture of Legislatures*

I have so far reviewed Waldron's scepticism about the capacity of courts to decide rights issues. This scepticism about courts is matched by a corresponding enthusiasm for legislatures. Waldron's model of legislative behaviour is, however, a more troubling and criticised feature of his argument.[83] He characterises legislative debate as:

> Opinionated disagreement — a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what's in it for them but by a desire to get it right.[84]

That argument seems open to the obvious objection that it is unrealistic and selective. Waldron does not consider the relevance of a strong party system or the control of the legislature by the executive — matters especially relevant to Westminster-style parliaments — which might undermine their democratic credentials. Nor does he refer in much detail to arguments about the 'undue' influence of well-organised 'interest groups' or wealthy individuals or corporations. With these kinds of structural deficiencies in mind, we might be justified in considering legislatures as forums for the unprincipled pursuit of self-interest, or the narrow interests of a few, rather than the principled pursuit of the common good.

But Waldron is not unaware of these points. Indeed, in passing, he is rather critical of these claims. He expresses some scepticism as to the accuracy of the most cynical analyses of legislative behaviour[85] and he cautions us from assuming that legislative politics is self-interested just 'because we find ourselves contradicted or outvoted on some matter of principle.'[86] Nonetheless, Waldron does not directly contradict these claims. He is unconcerned by them because his confidence in legislatures is philosophically, rather than empirically, based.

In part, Waldron fashions his model of legislation to correct an imbalance in legal philosophy. He criticises legal theorists for adopting the political scientists' cynical analysis of legislation without 'the good grace to match a cynical model of legislating with an equally cynical model of appellate and Supreme Court

[83] Eskridge, above n 66, 579–80.
[84] Waldron, *Law and Disagreement*, above n 1, 305.
[85] Ibid 30–1, 89, 230.
[86] Ibid 304. On matters of rights, he reminds us, there is ample room for sincere and reasonable disagreement.

adjudication.'[87] His point seems to be that, if legal scholars want to persist with their 'rosy' analysis of courts as 'forums of principle', then it ought to be balanced with an equally rosy analysis of legislatures.[88]

Moreover, he points to our acceptance of the authority of legislatures and their enactments. Since we are prepared to abide by their decisions, we must therefore believe that there is *something* in the nature of legislatures that makes their decisions worthy of respect. Legal theory ought, therefore, to respond with a theory that is consistent with the prescriptive force of legislation.[89] Finally, he returns to a point mentioned above, that scepticism of legislatures is in tension with any 'rights-based' theory because it disregards the qualities that lead us to ascribe rights to individuals: 'If democratic politics is just an unholy scramble for personal advantage, then individual men and women are not the creatures that theorists of rights have taken them to be.'[90]

Waldron's argument does not, therefore, simply fall in the face of familiar incantations of the failings of majoritarian politics. He seeks to bypass them with a theory of legislation driven by the authority of legislation and the nature of individuals as rights-holders.

However, that very style of argument may expose Waldron to criticism. It seems strange to combat an unrealistic theory of courts with a theory of legislatures that is similarly unconcerned with the facts of the matter. On the contrary, the appropriate response to a lack of cynicism about courts may be a more realistic (and therefore cynical) attitude towards courts and other political actors, including the individuals who vote for and participate in legislatures. In this vein, Richard Posner, who criticises Waldron's naivety about the legislative process, also rebuts his reliance on existing theories of courts:

> It is no argument at all that if we are going to be cynical about legislators, we shall have to be cynical about the opinions of judges, about constitution-framers, and about ourselves. We should be cynical about all three groups and design our institutions accordingly.[91]

The result may be that debates about bills of rights need to be much more fact-sensitive than has been the case so far.[92] The resolution of the debate may require a careful study of the actual operations of courts and legislatures and their

[87] Ibid 31.

[88] Ibid 32.

[89] Ibid 32–3 (emphasis in original):

> Unless we propose to treat the authority claimed for legislation as pure superstition, eventually that claim requires philosophical explication. Or, even if we are convinced that the conditions under which it is enacted seriously discredit legislation as an authoritative source of law, it behoves us to ask: would this be true of all legislation, legislation enacted under any conditions, or only legislation enacted under conditions that fell seriously short of some ideal? If we take the latter approach, then it is incumbent on us to articulate a reasonable ideal, showing how the authority of legislation could be linked practically to certain conditions of legislating in the circumstances of modern life.

[90] Ibid 304.

[91] Richard Posner, 'Book Review — Review of Jeremy Waldron, *Law and Disagreement*' (2000) 100 *Columbia Law Review* 582, 591 (citations omitted).

[92] For an excellent argument along these lines, see Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275.

relative strengths and weaknesses in the particular legal culture in which they operate. Even in this light, though, Waldron's contribution is enormous. Although he has not succeeded in establishing a philosophical argument *against* judicial review, he has evened the philosophical scorecard by demolishing the theoretical arguments in favour of judicial review and leaving the ultimate resolution of the question to a highly complex factual inquiry.

E *The* Australian Constitution *and Proposals for Reform*

Finally, let me turn to the relevance of Waldron's work to specific aspects of Australian government and proposals for an Australian bill of rights. Perhaps understandably, Waldron's points of comparison are a society of unfettered parliamentary sovereignty on the one hand,[93] and a society with a fully entrenched 'US style' bill of rights on the other.[94] Thus his argument is put against a fully entrenched bill of rights, and appears to assume that the alternative is a society without any kind of judicial review.

In this light, the Australian situation raises two interesting questions. The first is: what would Waldron make of bills of rights that are not fully entrenched? It is an important question in the English-speaking Commonwealth in which few countries have fully entrenched bills of rights.[95] Further, it is the kind of bill of rights most likely to be adopted in Australia, not least because of our history of constitutional amendment.[96]

Such bills of rights take several forms. The Canadian *Charter* is entrenched, and laws are generally subject to judicial review pursuant to the *Charter*. However, s 33 of the *Charter* allows legislatures to override it for a limited, though renewable, period by declaring that a law shall operate 'notwithstanding' the *Charter*. In New Zealand, there is no judicial review in the strict sense of courts striking down laws, but courts will interpret laws to be consistent with the rights found in the *New Zealand Bill of Rights Act 1990* (NZ) wherever possible.[97] In the United Kingdom, the courts also do not have the power of judicial review, but can make a declaration that a law is incompatible with a protected right.[98] That declaration gives rise to special ministerial powers of amendment.[99]

[93] Like New Zealand before the *New Zealand Bill of Rights Act 1990* (NZ) and the United Kingdom before the *Human Rights Act 1998* (UK) c 42, which came into force in October 2000.

[94] Waldron is a New Zealander, educated at Oxford, who has spent many years teaching in the United States.

[95] One exception is South Africa: *Constitution of the Republic of South Africa Act 1996* (South Africa) c 2.

[96] For example, the Australian Democrats have proposed a statutory bill of rights: Australian Bill of Rights Bill 2001 (Cth).

[97] For an argument that the *New Zealand Bill of Rights Act 1990* (NZ) has, nonetheless, been a powerful judicial tool, see Allan, above n 6.

[98] *Human Rights Act 1998* (UK) c 42, s 4.

[99] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2002) 49 *American Journal of Comparative Law* 707.

Waldron's argument is presumably weaker with respect to these kinds of bills of rights. As his objection is to the preclusion of the right of participation, it is not so clear that his 'rights-based' objection can succeed where that preclusion is merely provisional. Indeed, Jeffrey Goldsworthy has concluded that the 'rights-based' objection to judicial review fails in the face of a provision like s 33 of the Canadian *Charter*.[100]

The other interesting question is the relevance of Australia's existing system of judicial review. Although it has no bill of rights, Australia is unlike the society of total parliamentary supremacy that Waldron appears to have in mind. Judicial review has been exercised for over a century, principally on questions that relate to the nature of Australian federalism. Would Waldron object to that kind of judicial review in the same terms?

Judicial review on federalism grounds certainly precludes the right of participation which founds Waldron's objection to bills of rights. Moreover, questions of federalism raise difficult issues to which there are competing answers.[101] It is not clear whether Waldron would say that the same kind of indeterminacy arises. He focuses on the intractability of 'moral' disagreement. Bills of rights clearly include moral concepts,[102] but the questions raised by federalism seem to fit more neatly within traditional ideas of 'political philosophy', questions about the kind of political institutions we should have.

Whatever the answer to that question, I do not think that judicial enforcement of the federal division of powers ought to affect the bill of rights debate. Even if we could demonstrate a strong similarity between judicial review under a bill of rights and under a federal constitution, that would not establish very much. It would show only that a bill of rights would not impose an entirely new role on Australian judges. Nonetheless, a bill of rights would vastly expand the range of circumstances in which judges decide (and perhaps have the final word on) highly complex and controversial issues. That is a significant change which requires critical analysis. If Waldron is right, judicial review is a practice that should not be expanded any further.

V CONCLUSION

The bill of rights debate in Australia and elsewhere has been long-running and its basic contours are well established. However, *Law and Disagreement* shows there is still room for important contributions. Jeremy Waldron focuses more clearly than any other theorist on the nature of the issues that bills of rights present to courts and the capacity of judges to decide what rights mean. *Law and*

100 Jeffrey Goldsworthy, 'Judicial Review, Legislative Override and Democracy' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Human Rights: Philosophical Foundations and Institutional Design* (forthcoming, 2003).

101 Indeed, the nature of federal relations has recently been subject to intense and renewed controversy with at least two versions of federalism, described by commentators as 'co-operative' and 'co-ordinate federalism', competing for ascendancy in the High Court: Graeme Hill, 'Revisiting *Wakim* and *Hughes*: The Distinct Demands of Federalism' (2002) 13 *Public Law Review* (forthcoming).

102 See above n 21.

Disagreement is therefore a major contribution to constitutional theory and legal theory in general. It presents an important theory in an erudite but accessible manner. It should be required reading for any serious participant in the Australian bill of rights debate.

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