

# An Obsolete Separation of Powers?

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**Is the Supreme Court democratic? No, replies Jeremy Waldron, who considers that the judicial branch should not substitute itself for citizens to determine their rights. But is his view of the separation of powers still valid today?**

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Review of: Jeremy Waldron, *Political Political Theory*, Cambridge, Harvard University Press, 2016, 403 p.

Jeremy Waldron, professor of Legal and Political Philosophy at New York University, has written major contributions to recent political thought on rights and democracy. In *Political Political Theory*, he brings together twelve articles that have been published (with the exception of three) in different journals over the last ten years.

Two red threads run through these essays that weave the fabric of a book. The first gives its title to the work, and corresponds to Waldron's stated objective: to offer a properly *political* theory that puts the institutions and processes characteristic of democratic systems back at the center of philosophical and normative reflection—an approach that contemporary philosophy has tended to neglect in favor of examining more abstract principles like justice and equality. The second, less perceptible thread is even more ambitious: In these pages, Waldron puts forward a new theory of the constitution as an instrument for empowering and organizing authority, rather than as a tool for limiting it in the name of individual rights.

# **Towards a Renewal of Political Philosophy**

The book opens with a critical observation. Waldron argues that in the wake of Isaiah Berlin and John Rawls, contemporary political philosophers have tended to model their questions and modes of reasoning on those of moral philosophy, as if social and political problems were not susceptible to specific normative treatment. This “political moralism,” to use an expression Waldron borrows from Bernard Williams (p. 5), has led political philosophy to concentrate exclusively on the ends and principles of a good political society, to the detriment of a normative questioning of the institutions, structures, and political processes that help to give reality to these more abstract ideals.

Institutional questions were once central to the reflections of political philosophers who, following the example of Montesquieu, Locke, or Bentham, endeavored to think in detail the modalities of the separation of powers, the meaning of the rule of law, the advantages of federalism, or the practical requirements of political representation. Waldron aims to restore the centrality of these questions by devoting, for example, two chapters to the principle of the separation of powers, four chapters to the legislative assembly and to the various rules and processes that enable it to exercise its function as a “dignified” law-making body, and, finally, two chapters to judicial power in its relation to legislative power.

While Waldron advocates a rapprochement of political philosophy with legal theory and political science, including in its empirical dimensions (pp. 12, 16, 19), he nevertheless insists that structural and institutional questions are also *normative questions*—i.e., questions of political morality. In this perspective, theory must be asserted as “political” precisely because political institutions and processes involve, down to the most practical details, fundamental “choices” (p. 8) that call for justification. As such, it must explore how these choices translate into practice, since ideals of justice, equality, and respect—to which political theory wishes to exclusively devote itself when it seeks to ape moral philosophy—are indeed more or less achievable, depending on the institutional organization that carries them and whose very existence, properly speaking, helps to give them body.

## **Rethinking the Constitution of Power**

Waldron’s interest in institutions is not merely the result of a methodological posture. It expresses a deeper ambition: to change our understanding of the nature and role of the constitution of power. Indeed, Waldron is deeply “skeptical” towards contemporary

constitutionalism, which essentially construes the constitution as a means of preventing abuses of power by the state, and therefore strictly identifies it with limited government (Chapter 2). From this perspective, the essential function of the constitution is to establish fundamental rules that orchestrate the restriction of power, by; forbidding it to perform certain actions (via a declaration of rights); dispersing it (via the separation of powers); slowing down its effects (via bicameralism); and subjecting it to the procedural requirements generally associated with the rule of law. Constitutional provisions, institutional mechanisms, and procedures are seen only “through the lens of restraint and limitation” (p.36).

For Waldron, this approach is singularly reductive. As its name indicates, a constitution does not chiefly operate as a restriction, but as an instrument for the construction and empowerment of public authority (p. 34). The rules it sets are not primarily aimed at constraining power but at establishing it—at constituting it as such. The purpose of a constitution is to give collective and public means of action to the members of the political community, so that they may successfully pursue projects that they would otherwise not be able to see through on their own. The rules, procedures, and public institutions provided by the constitution indeed ensure the “control” of power. However, such control must be construed as the positive faculty to hold the reins of the state, not as a wholly negative “constraint” (p. 30). The institution of a second chamber, for instance, should not be conceived as a mere dilatory maneuver: it offers a means of empowering “different voices” in the community (p. 36). Similarly, the separation of powers does not essentially refer to a mechanism for the dispersal and restriction of power through checks and balances. Rather, it takes cognizance of differentiated “functions” (p. 51) within the state. By positing the necessity of distinguishing between the powers to make, implement, and enforce the law in individual disputes, the principle affirms the particular “integrity” (p. 36, 46) of each branch of government, and determines the specific forms and processes of their action.

According to Waldron, this tendency to regard constitutional rules merely as limitations placed on political power flows directly from contemporary constitutionalism’s defiance towards the democratic project. While many constitutionalists tellingly define the constitution as a bulwark against the “tyranny of the majority” (rather than against tyranny in general, p. 38), Waldron seeks, on the contrary, to produce a constitutional theory that guarantees citizens “control” over their own constitution. It is this commitment that motivates his well-known opposition to the judicial review of the constitutionality of laws voted by the assembly.

## Judges and Democracy

In the US democratic system, any law voted by Congress or by the assembly of a state can be reviewed *a posteriori* by the courts and declared void in the event of non-compliance with the Constitution. In what is probably the most remarkable chapter of the book, “The Core of the Case Against Judicial Review,” (first published in 2005 in the *Yale Law Journal*), Waldron suggests that such a system, which has nonetheless inspired a growing number of democracies since 1945, cannot purport to offer a universal democratic norm. In a well-functioning democracy, when there is disagreement on rights, the supreme decision should rest with elected and representative institutions, not with the courts.

Waldron raises two objections against the judicial review of constitutionality. The first is that it suffers from substantial defects. By concentrating excessively on the constitutional text, the judges responsible for reviewing the law fall into “rigid textual formalism” (p. 222) and into disputes over interpretation that divert them from genuine reflection on the moral and political issues raised by the law under consideration. Waldron strikingly contrasts the meager paragraphs, buried under infinite exegetical and jurisprudential considerations, that *Roe v. Wade* devotes to the question of the fetus’ moral status with the long hours of parliamentary debate on the moral, social and practical aspects of the legalization of abortion in the House of Commons in 1966. The example suggests that a legislative assembly, so long as it is representative, deliberative, and free from exaggerated reverence for the legal text, might constitute a more appropriate forum than a court of law to reflect on rights and to resolve the disputes to which they give rise.

According to Waldron, the second defect of the judicial review of constitutionality is its fundamental lack of democratic legitimacy. The nine judges of the Supreme Court are neither elected nor accountable to the citizens (p. 231). A system that substitutes the judges’ own appreciation of what rights require for the decision of representatives elected by citizens for the publicly stated purpose of drafting the law on their behalf clearly violate the principles of political representation and equality, says Waldron. It deprives ordinary citizens of their decision-making power. Indeed, fairness requires that everyone be guaranteed an equal voice in the collective decision-making process. In this regard, entrusting to a “nondemocratic” body the power to decide in the last instance on the validity of laws shows a lack of “respect” for ordinary citizens, insofar as they, too, are capable of “political judgment” (p. 141).

One can evidently ponder over the implicit categorization that underpins Waldron’s reasoning. Characterizing the constitutional court as a non- or less democratic institution implies

identifying democracy with the sovereignty of representatives that citizens regularly elect to make law on their behalf (pp. 106, 125). However, it could be argued that a democratic constitution is not just an electoral system, and that, under the aegis of the separation of powers which Waldron otherwise praises, judicial power is as legitimate an institution as is an elected assembly. Beyond this, what is striking about Waldron's argument is its failure to make room for the concept of *fundamental* rights. If citizens or their representatives can at any time define and redefine rights, is there not a risk that the very notion of constitution as fundamental law—setting the rules for the ordinary play of democratic politics—will vanish?

Waldron tempers his rejection of the judicial review of constitutionality by admitting that, in certain circumstances, it may be necessary, for instance, to counterbalance the dominance of the executive over the legislature in a unicameral parliamentary system (p. 86), or to protect certain “discrete and insular” minorities against the indifference or prejudices of the political and social majority (p. 241). But he then immediately emphasizes that these situations correspond to exceptional deviations from what must otherwise constitute the norm of a democratic society: namely, well-functioning democratic and judicial institutions and a general and disinterested attachment of citizens to the idea of individual and minority rights, despite persistent disagreement over what these rights exactly cover (pp. 202-212). In a democratic society such as the United States, where democratic institutions are corrupted by lobbies' disproportionate influence over the legislative process, and where inherited racism raises fears that members of some minorities will not be treated with equal consideration by their fellow citizens, judicial review may serve as a useful bulwark. But then, Waldron insists, the local and conditional character of its justification must be fully recognized rather than presented as the prerequisite for any constitutional democracy worthy of the name (p. 245).

## **The Memory of Things Past**

*Political Political Theory* is both prolific and rigorous in its arguments. Upon finishing the book, the reader may nevertheless wonder whether Waldron has met his objective. Has he succeeded in demonstrating the interest, for normative political theory, of a distinct reflection on institutions, structures, and political processes? As a matter of fact, neither the meticulous description of institutional practices nor the exhaustive comparison of the political traditions of different countries rests on a particularly solid theoretical foundation in the book. It seems that Waldron's decision to explain in detail the functioning of the empirical machine has led him to undertheorize the normative principles that underlie the institutional logics under study. Very often he mentions those principles only superficially, without providing any extensive justification for them, and, stranger still, without dwelling on their articulation with the institutions and

structures in question. For instance, when he analyzes the “principle of loyal opposition”—according to which, in a democracy, the party defeated in the election does not secede but actively contributes, via the channels prescribed by law, to challenging the government’s actions and to paving the way for political alternation—Waldron devotes comparatively few lines to justifying the principle itself. He contents himself with mentioning the political “disagreement” that inevitably prevails between members of a same society, and then devotes several pages to comparing the various institutional arrangements that make it possible, in the United Kingdom and the United States, to grant political opposition a status and a role. This empirical discussion certainly does not lack interest, but its contribution to normative theory is not immediately obvious.

One can also wonder about the novelty of Waldron’s analyses. His approach certainly goes against the current trend in political philosophy, which is little concerned with contextualizing its concepts, and often assumes the latter to be universal truths. And yet, the institutional mechanisms he wishes to highlight are far from unknown. Separation of powers, bicameralism, and types of political representation were discussed and theorized by political thinkers precisely as they were being introduced into the constitution and practice of power. These are important questions, but they were settled by political theory in their day. Waldron’s informed discussion of Montesquieu, Bentham, and Sieyès does not result in any significant reconsideration of these questions.

But renewal may not be what Waldron is aiming for. On several occasions, he seems to express a certain nostalgia for the past. He maintains that while the “old principles” (p. 85) of the separation of powers or of deliberative assembly may seem obsolete in the era of political parties and independent administrative agencies, it is nevertheless important to study them, as if to remember what has been lost. In a book that seeks to reconnect philosophical accounts of political ends and principles with actual political institutions and practices, this posture may seem curious. If the point is to show how principles can and should be embodied in institutions, then why appeal to old recipes whose application is immediately compromised by the contemporary political context—for instance, legislative deliberation in a party-based democracy or separation of the three powers in the era of overlapping executive, legislative, and judicial functions? To be unequivocally “political,” Waldron’s “political theory” would have needed to revisit the principles of the separation of powers or of political representation—to name but a few—and to propose institutional arrangements able to ensure that the spirit of these principles is respected in the current democratic context.

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