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JEREMY WALDRON ON *LAW AND DISAGREEMENT*[1]

Politics is about disagreement. This is the guiding idea of Jeremy Waldron's intriguing argument in *Law and Disagreement*,[2] and it guides him to a view that places unusual and inspiring faith in democratic processes of legislation. Waldron's democratic faith works to the detriment not only of would-be dictators, but also of supreme courts purporting to pass on legislation's propriety, and even, I believe, against accounts of political authority (or legitimacy; I will interchange these terms) that rely on the possibility of a public conception of justice or legitimacy. These same themes are also present in a companion volume, *The Dignity of Legislation*,[3] though I will consider it only in a supplementary way.

The question for Waldron is how law and politics can claim authority over citizens in the light of widespread disagreement about even such basic matters as justice and legitimacy. Waldron assumes that political authority cannot exist unless it can, in principle, be justified to each person it purports to bind, even to many who are mistaken (LD p. 229). I'll call this general view the *liberal conception of political legitimacy*.

On the other hand, as Waldron recognizes, not just any disagreement could have this kind of weight in justification-an effective veto over claims to authority. Some disagreement is crazy, as when some proposal is rejected by a citizen who thinks it would give too much power to the fairies. Some disagreement is unfair, as when a citizen rejects any proposal that would not make him king. These are only extreme examples, but they show that even if some cases of disagreement defeat claims to political authority, not all do. For ease of reference I will give a name to disagreement that has that moral weight: call it *reasonable disagreement*. I'll say very little about what makes some positions reasonable and other ones not. My only point here is this: if we follow Waldron's liberal approach

to legitimacy we must make some objections matter and others not. The only alternatives to making this distinction between reasonable and unreasonable objections are a) to make no objections matter in this way, contrary to the liberal approach, or b) to make all objections matter in this way, contrary to the patent weightlessness of many crazy or vicious objections. The question then is not whether to distinguish reasonable from unreasonable views, but where to draw the line.

Waldron accepts this. It is only "good faith" or "reasonable" disagreement that legitimate authority must accommodate on his view.[4] So when he argues that there is disagreement about everything including justice, rights, and fairness, he is not making the empirically obvious point that everything is controversial to some degree. *Brute disagreement*, as we might call it, is undoubtedly pervasive. But Waldron has to mean rather that any position about rights, justice, or fairness could be rejected *reasonably*. This must mean that all positions on these matters are rejectible on grounds that are entitled to a veto, unlike crazy or vicious objections, for example. Waldron's central thesis is that there is such breadth and depth of reasonable disagreement that *there is no morally available basis* for constraining majoritarian political procedures by judicial review, or for basing political legitimacy on any tendency of political decisions to be good, or just, or true. Majoritarian processes cannot be subordinated to any particular account of justice, or rights, or even democracy without enshrining some view that is open to reasonable objection. Waldron's claim is not the empirical proposition that there is pervasive brute disagreement on all matters germane to politics. Waldron's point about justification is the claim, partly empirical but partly moral, that there is pervasive reasonable disagreement on all these matters.

This has consequences in a number of areas, including the legitimacy of judicial review on one hand, and the admissible shape of a theory of political legitimacy on the other. Of these two consequences, the latter is more basic. Waldron's critique of judicial review rests, in this book, on his more general view that political justification cannot go farther than the justification of fair majoritarian procedures incorporating large diverse and deliberative bodies of citizens or representatives. Anything more substantive

than this fails to respect the wide and reasonable disagreement that actually exists among citizens. There is a negative claim and a positive claim about legitimacy here. The positive claim, call it *Fair Proceduralism*, is that,

political decisions can be rendered authoritative on the basis of their having been produced by a deliberative majoritarian process that is fair to all citizens and points of view.[5]

The negative claim, call it *Deep Disagreement*, is that,

no position about what is required by fairness or justice or legitimacy is beyond reasonable disagreement.

The difficulty I want to explore is that these two claims of Waldron's seem incapable of jointly coexisting with Waldron's liberal conception of political legitimacy. As I formulated it above, the liberal conception of legitimacy holds that political legitimacy and authority depend on justifiability to all. The more specific version I want to consider, I'll call the *No Reasonable Objection* account of legitimacy:

political power is illegitimate unless there is a basis for it that is beyond reasonable objection.

When combined with Deep Disagreement, the result is philosophical anarchism, the view that,

no claim to political authority is legitimate.[6]

But philosophical anarchism contradicts Waldron's acceptance of Fair Proceduralism, which advances a supposed basis for legitimate political authority. Any basis for legitimate political authority such as Fair Proceduralism is ruled out by the combination of No Reasonable Objection and Deep Disagreement. Either I am wrong to think that Waldron holds all three of these views, or he ought to give at least one of them up.

Waldron never formulates his standard of political legitimacy explicitly in terms of reasonable objection, but stays with the more general idea of justifiability to each person. One way of avoiding the inconsistency I've described would be to divorce the *justifiability* in his formulation from *reasonable acceptance* in mine. Then the

pervasiveness of reasonable disagreement would not push his view toward anarchism. In order to avoid the inconsistency in this way Waldron would need to hold that a claim to political authority could in some cases be justifiable to each person even if some citizens might have reasonable objections.

In an earlier essay considering the question what is common to and distinctive of liberal political theory, Waldron says that the whole project of liberal justification would fail to get off the ground without employing some conception of reasonableness, and suggests sympathy with a liberalism based on "hypothetical consent," or acceptance by all those meeting pertinent minimal moral criteria.[7] In our terminology, such a view accepts the No Reasonable Objection standard of political legitimacy.

And in this new book Waldron several times reasons from a principle of No Reasonable Objection, even without explicitly stating such a principle.[8] His emphasis on the breadth and depth of reasonable disagreement is aimed at showing that these many controversial matters cannot be relied upon in political justification and so they cannot form any basis for constraining majoritarian procedures, or for understanding their point. The book is about the pervasiveness of disagreement among reasonable citizens and the illegitimacy of proceeding on grounds that are subject to such disagreement. The association of political legitimacy with acceptability to all reasonable citizens, then, would seem to be indispensable to Waldron's main line of argument.

If, as it appears, Waldron accepts the No Reasonable Objection view of legitimacy, then consistency requires that he reject either Deep Disagreement or any positive account of legitimacy such as Fair Proceduralism. It is clear that Waldron believes there is a basis for political legitimacy, and this too is central to his argument. He tirelessly and eloquently urges the reader to show the respect for majoritarian democratic processes that a liberal respect for individuals requires, and to accept those processes as the final political authority, at least when they are properly constituted and employed in circumstances where there is a need for a common course of action and yet disagreement about which action to take. In these circumstances, Waldron holds, majority decision has "constraining authority" – citizens are obligated to obey.[9] Waldron is committed to

Fair Proceduralism, then, or at least to some account of the authority of majority decision that defies Philosophical Anarchism. Perhaps, then, he does not accept Deep Disagreement which along with No Reasonable Objection entails philosophical anarchism.

Waldron never explicitly asserts Deep Disagreement, but he seems committed to it. This is where I think the view ought to budge. Certainly, any account of political legitimacy will be open to disagreement. And we should grant that those who disagree cannot all be dismissed as crazy or vicious. But is this enough to show that the disagreement about an account of legitimacy is morally weighty enough to effectively veto appeals to that account in political justification? Brute disagreement is empirically obvious; reasonable disagreement is not.

On the other hand, an important message of Waldron's book is that it is drastic and often unseemly to characterize positions taken by evidently conscientious citizens as not only mistaken but so defective that they can legitimately be ignored in political justification (e.g., LD p. 92). After all, if we are willing to treat the positions of even decent citizens as beneath our respect, it is far from clear that we meant what we said in adopting the liberal view that political legitimacy requires justifiability to each and every citizen. This is an important warning. And it is precisely what is troubling to so many about the very distinction between reasonable and unreasonable objections. But we have to keep our eye on all the threats at once, not just this one. In a spirit of generosity, we might keep the category of unreasonable disagreement narrow and say that legitimacy requires that there be no objection that is not, say, crazy or vicious. All other objections would be decisive. But this shores up one weakness in the hull of our ship by blowing a hole in the other side. For there is no account of political legitimacy, including Fair Proceduralism, to which the only objections are crazy or vicious. This more generous specification of reasonable disagreement leads straight to philosophical anarchism, the absence of any political legitimacy or authority.

Not everyone would be troubled by this result, but rather than taking up the merits of philosophical anarchism, I shall assume that Waldron would find this implication to be an excellent reason for reexamining his premises. And many of us will follow Waldron

in this: if we think that there is any political arrangement, e.g., some liberal democratic arrangement, that is capable of producing laws that are legitimately enforced and which there is some moral obligation to obey, and at the same time we accept a liberal conception of legitimacy that makes reasonable objections fatal to political justification, then we simply cannot also believe that every objection is reasonable in the requisite sense just so long as it is neither crazy nor vicious. At the risk of unseemliness, we must rather hold that even some non-crazy, non-vicious objections are nevertheless unreasonable. Perhaps no less generous account of reasonableness can be supplied that will satisfy us that the right objections and only the right objections are being put beyond the pale. In that case, we may need to conclude that political legitimacy of the liberal sort is impossible after all. I share what I take to be Waldron's view here: that it would be premature to draw that skeptical anarchistic conclusion. But I believe this faith in liberal justification requires us to be candid about the need to count even some non-crazy and non-vicious objections as unreasonable objections. If political power is to meet the standard of liberal legitimacy then disagreement can only be so deep; on at least some basic matters it must be the case that such disagreement as does exist is unreasonable, and in that sense less deep than he suggests.

It may be that Waldron would hold onto Deep Disagreement and let the liberal character of his view of legitimacy be weakened in order to avoid the conflict I've described. There is an ambiguity in the way I have so far discussed legitimacy. Legitimacy might be the feature of a legal system whereby every citizen is normally morally obligated to obey the laws (call it compliance legitimacy). Alternatively, a legitimate system might be one that it is morally justified to coercively enforce (call this enforcement legitimacy). Or legitimacy might comprise both of these features. In a reply to a previous version of these comments, Waldron proposed to limit the application of his liberal approach to legitimacy to compliance legitimacy; we might describe this as accepting compliance liberalism but rejecting enforcement liberalism.[10] This would mean retaining the liberal view that a person has an obligation to obey the laws and principles of a society only if they can be justified to him. But by rejecting enforcement liberalism Waldron would be

allowing that even in a case where the laws and principles are not justifiable to you (and even if you're perfectly reasonable), the state may nevertheless coerce your compliance. The exercise of coercive enforcement by the state would be morally unconstrained by the question of justifiability to the affected citizens. This strikingly less liberal view would allow Waldron to explain how Fair Proceduralism might warrant coercive enforcement of democratically passes legislation even if, as he expects, some individuals reasonably reject Fair Proceduralism.

The first question we should ask is why coercion liberalism can be jettisoned when it comes to arguing from Fair Proceduralism, whereas it remained in force when the question was whether to coerce simply on the basis of the truth about justice. In Waldron's view, the importance of majoritarian procedures is precisely that any direct appeal to what would be best to do would be illegitimate given that many will reasonably disagree. If we can split compliance legitimacy from enforcement legitimacy in the way that Waldron proposes, we could have done it at the beginning, saying that while those who reasonably disagree with the justice of a law have no obligation to obey, we are nevertheless permitted to coercively enforce the best laws whatever they are. The need for majoritarian procedures would never arise. Clearly Waldron thinks that not just coercion legitimacy but also compliance legitimacy depends on there being a justification that is beyond reasonable disagreement, and this is what propels the theory toward a majoritarian solution. But then he says that the justifying account of majority rule can make coercive enforcement legitimate even if there is reasonable disagreement about it. Coercion liberalism is dropped without explanation.

But what moral basis is there for limiting the liberal principle of legitimacy in this way? I think of the liberal principle of legitimacy as an anti-boss principle: there are no authority relations between people except those that can be reconciled with the reasonable will of those putatively subjected to it. But this anti-hierarchy idea seems to constrain the permission to coerce as much as the duty to obey. Or if it doesn't, Waldron has yet to explain the difference.

Notice that this does not mean that there can never be a permission to coerce unless there is also a duty to obey. There is no contradiction in holding that

a) it is morally permitted to run a stop sign under very safe conditions, and
b) the state is permitted to punish even safe stop-sign running, and
c) the moral status of both legal obedience and legal enforcement must be established on grounds acceptable to all reasonable citizens.

My claim then is not that permission to coerce and the duty to comply always come as a package. My claim is that the same moral ideas that support Waldron's compliance-liberalism, namely the idea that there are no bosses, equally well support enforcement-liberalism. If I'm right and Waldron can be denied his halfway liberal legitimacy, then he faces the problem I've been pressing: that if reasonable disagreement is as deep as he says it is, then there is no political arrangement that is either obligatory for all citizens, or even permissibly implemented and enforced.

In any case, on Waldron's own view majority decision is a legitimating process under the right conditions, producing binding law. The No Reasonable Objection principle seems to require him to say that this account of legitimacy is beyond reasonable disagreement. Why, then, is he led to suggest that there is reasonable disagreement even about this? The reason, I suggest, is the thought that if there were no reasonable disagreement about matters of legitimate democratic procedure, then the disagreement we find among citizens might be trumped by the supposedly more expert view of an elite supreme court.[11] This is an understandable concern, but the legitimacy of such a court would by no means follow simply from there being a conception of legitimate democratic procedure that is beyond reasonable objection. The existence of a court with powers to review pertinent legislation may be subject to reasonable objections on other grounds. For example, there may be reasonable doubts whether such a court is likely to better ascertain and implement the proper standard than a majoritarian procedure. So the slope is not as slippery as Waldron may fear from holding that a conception of democratic legitimacy is beyond reasonable objection to holding that some court must be superior to the legislature.

A natural adjustment to Waldron's view, then, would be to avoid anarchism by holding that reasonable disagreement, while extensive, does not extend to Fair Proceduralism itself, at least in some fairly abstract formulation.[12] So, he might hold that it is unreasonable to object to the view that in the face of reasonable disagreement about all other aspects of justice, rights, and the common good, decisions on these matters ought to be made by way of a fair process of democratic deliberation. The fairness of the process transfers to the outcomes, and places obligations of fairness on all citizens to obey. This obligation would constitute the authority of legislation, and the ultimate authority behind all political power.

This avoids anarchism while maintaining the No Reasonable Objection view and Fair Proceduralism, by moderating the claim of Deep Disagreement. The question then turns to whether Fair Proceduralism is indeed an adequate theory of democratic legitimacy. Let me distinguish between two aspects of this contemplated adjustment to Waldron's argument. One aspect is the acknowledgement that some account of political legitimacy is beyond reasonable disagreement, placing limits on the depth of disagreement. This aspect I have recommended and do not mean to challenge. A second aspect is the proposal of Fair Proceduralism in particular as the suitable account of political legitimacy. I want now to criticize this particular account of the democratic basis of legitimacy in order to campaign for an alternative that may be less open to reasonable objections, an alternative with which Waldron repeatedly flirts and which he may even find congenial.[13]

Fair Proceduralism says that a law is legitimate when it has been produced by a process that is fair to all citizens. Majority rule with equally weighted votes would be one example of a fair procedure. The legitimacy of resulting laws – the source of a citizen's obligation to obey – is a matter of fairness, or as some have said "fair play."

Majority rule, of course, is only one example of a procedure that is fair to all citizens. A coin flip to decide between a policy or its rejection is equally fair to everyone. But as Waldron points out, no one would think this an appropriate way to make political decisions (LD p. 89). This shows, I believe, that no one really thinks that the legitimacy of a law derives simply from the fairness to all

citizens of the procedure that produced it. Fair Proceduralism should be rejected for this reason.

Waldron anticipates the objection that a coin flip, or "more carefully" a lottery picking a person's view at random to be the collective decision, would be as fair as majority rule, and briefly ventures a reply.

A case can be made that an equal distribution is a distribution at the highest level consistent with equality. If so, the majority principle fares better as a principle of equal respect, because it gives each individual's vote a greater chance of determining the outcome than it has in the lottery proposal. (DL 160ff)

Waldron doesn't supply the argument for this mathematical claim, but it is apparently correct.[14] Even though majority rule gives each person a higher equal chance of being decisive than the lottery, that criterion – highest equal distribution of chance to be decisive – seems hard to motivate on the basis of fairness alone. After all, a coin flip on a dichotomous social choice gives no one any chance of being decisive, but seems entirely fair insofar as it gives no one any more chance than anyone else. It gives each person an equal and non-zero chance of seeing their favored view realized. Why isn't that as much a conception of procedural fairness as one concerned with a person's chance of being decisive? I don't believe, then, that procedural fairness can explain why, as we all believe, majority rule is a better collective choice procedure for legislation than various ways of choosing randomly.

Waldron might reply, majority rule's superiority over a lottery or a coin flip can be explained by a value more specific than fairness: the value of giving each person the greatest possible chance of being decisive compatible with everyone's having an equal chance. I don't know whether this uniquely specifies majority rule (and it is an interesting question), but suppose that it does. Two problems stand in the way of Waldron's taking this view: First, it remains unclear why this is a value. It is not explained by procedural fairness as I have said. It is not explained by the value of equal respect for persons, since a coin flip or a lottery show no failure of equal respect. If maximizing equal decisiveness is an important value, Waldron needs to say why it is, since it would be the only reason he gives for preferring majority rule to a lottery or a coin flip. Second, even if maximizing equal chance of decisiveness singles out majority rule

it also militates in favor of very small legislative bodies. The chance of an individual's being decisive goes down with the size of the assembly.[15]

While Waldron extols mainly the procedure's fairness, the other features he includes point in a different direction. He always describes the fair majoritarian procedure he endorses as including intelligent deliberation about justice and the common good (e.g., LD p. 71) among a diverse and numerous body of citizens or representatives (e.g., LD p. 51). Deliberation, diversity, and large numbers of participants are not necessary for a procedure to be perfectly fair, since nothing is procedurally more fair to all citizens than a random choice; nor are these required to maximize equal individual chance of being decisive. What these additional features do plausibly add to the procedure, though, is the application of intelligence to the questions facing a polity in a way that promotes the chance of a wise decision. Call this an *epistemic dimension* of democratic authority.

Waldron has a fair amount to say in both books about epistemic approaches to majority decision making, but oddly these reflections don't leave any traces on his account of democratic legitimacy. They are confined to his account of the proper interpretation of laws (LD Ch. 6). Waldron seems ambivalent about appealing to epistemic value of democratic processes, and it is worth considering why.

One central reason is that Waldron seems to think that there would be no basis for epistemic faith, beyond reasonable objection, in democratic procedures unless there were also a public conception of justice or the common good that were acceptable beyond reasonable objection, that supplied the independent standard by which the epistemic value of the process could be measured. Moreover, he thinks there is no such publicly acceptable conception (LD pp. 252–253, DL pp. 161–162). I'm not sure that this is correct, since I see it mainly as a moral question about how many positions can be counted as unreasonable, rather than mainly an empirical question about how much disagreement there is. But I want to grant this for the sake of argument in order to challenge the conclusion Waldron draws from it. Since he holds that reasonable disagreement covers all conceptions of justice and common good, he concludes that the epistemic approach is made unavailable by the No Reasonable Rejection standard of legitimacy. This may be too quick.

Call a *substantive epistemic account* an account that first posits some conception of justice or common good and, second, claims that democratic procedures are likely to get things right according to that standard. For example, consider a view that posited Rawls's two principles of justice as the standard, and then argued that certain democratic procedures tended to promote justice according to those principles. By contrast, consider a *formal epistemic account* according to which a democratic process is held to have a tendency to get things right from the standpoint of justice or common good *whatever the best conception of those might be*. The formal epistemic approach makes no appeal to any specific conception of justice or common good and so would be untroubled by the fact that there is reasonable disagreement about which conception is best or correct. Such disagreement would not hamper the epistemic approach if it could be established beyond reasonable disagreement that whatever the best or correct conception of justice or common good is, certain democratic procedures have a certain tendency to produce outcomes conducive to justice or common good.

To Waldron, the formal epistemic approach sounds far-fetched (LD pp. 253–254). How could we have any confidence in the ability of a process to get the right answer if we don't even know what would count as a right answer? But notice that this is the normal situation in epistemology. We do not normally have independent access to the truth by which we can calibrate the epistemic value of some method or process of investigation. When some scientific procedure is held to have epistemic value the argument must normally proceed in what I have called the formal epistemic manner. Arguments must be offered to show that, whatever the truth is, this process has certain tendencies to ascertain it.[16] If democratic epistemology is treated in the normal way, formally rather than substantively, reasonable disagreement over the correct conception of justice or common good is no obstacle to an epistemic conception of democratic authority.

Waldron objects: "In the midst of moral disagreement we are not in possession of any uncontroversial moral epistemology" (LD p. 254). In other words, just as there is reasonable disagreement about justice itself, and reasonable disagreement about any supposed experts on justice, there is reasonable disagreement about the reliability of any supposed justice-detecting procedure. But is

this obvious? There is disagreement about everything, of course, including about Waldron's own Fair Proceduralist account of legitimacy. But, as I've argued, if we believe in the possibility of liberal political legitimacy at all then we can't believe that there is reasonable disagreement about every possible basis of legitimacy. My strategy is this: let's *almost* grant Waldron the reasonable acceptability that he needs for Fair Proceduralism. But then we note the reasonable objection that fairness provides no more legitimacy than a coin-flip, and so it gives very weak reasons to comply in cases where the agent believes the procedure has gotten it wrong. An Epistemic Proceduralism[17] addresses this objection and accounts for Waldron's commitment to diverse, numerous, and deliberative majoritarian bodies. Now, of course, there is no guarantee that the formal epistemic account of democratic deliberation that is required can be supplied beyond reasonable disagreement, and Waldron lists a number of difficulties. But this important loose end is no advantage for Fair Proceduralism, whose normative force is as thin as a dime.

I applaud the motives that appear to be behind Waldron's resistance to any epistemic dimension of democratic authority. It is a traditional concern about epistemic political arguments: as in Plato, they tend to lead to implausible arguments for what I call *epistocracy* – rule by a wise elite. Waldron's application of this point against the modern comfort with judicial review of legislation is welcome, whether or not we should ultimately reject that institution. But the injection of an epistemic dimension need not support epistocracy, since there may well be reasonable disagreement about the moral expertise of any proposed elite, a disagreement that does not apply to the moral expertise of certain fair, deliberative, diverse, numerous majoritarian procedures of the kind whose deliberative capacities Waldron repeatedly urges us to regard with faith and respect. But whether or not the epistemic account can succeed, Waldron's non-epistemic account of democratic legitimacy in terms of fairness alone is vulnerable to his own very plausible dissatisfaction with political choice by coin-flip.

GIVING DELIBERATIVE DEMOCRACY ITS DEW

Waldron criticizes what he calls the "dewy-eyed" attempt to ground political legitimacy on consensus among all reasonable citizens, and the hope to produce or discover such a consensus partly by means of processes of "deliberative democracy" (LD pp. 91–93). Waldron opposes to this his own view that disagreement even on fundamental matters may well all be reasonable. If Waldron accepts the No Reasonable Objection view of political legitimacy then he must either think consensus among reasonable citizens is possible on some fundamental matters, or accept philosophical anarchism. If "dewy-eyed" means unrealistically optimistic, then Waldron's view, which is less willing to believe that disagreement is owed to unreasonableness, is a view through some dew of its own.

The pejorative characterization aside, there is a confusion here that is not uncommon. Rawlsian theorists of deliberative democracy often appeal to what Rawls calls an "overlapping consensus." And the possibility of consensus, taking that word out of context, can easily seem utopian or unrealistic. But the appeal to overlapping consensus in Rawlsian theory is no more than what is required to meet the No Reasonable Objection account of political legitimacy itself, an account that Waldron himself appears to hold.

What is distinctive and most controversial about Rawlsian theory is the suggestion that this quasi-consensualist standard could be met by something other than actual consensus among all citizens. Rawlsian theory, with no dew in its eyes, recognizes that there will never be actual consensus on anything of importance. In the face of this disappointing fact Rawlsian theory proposes that the spirit of a liberal standard of legitimacy is still met so long as the actual disagreement on certain fundamental matters can be found to be unreasonable. It would be far less realistic to hope that there will be actual agreement on fundamental matters. It would also be less realistic and overly optimistic in a different way to think or hope that all disagreement on fundamental matters were fully reasonable. Rawlsian theory uses the word consensus, but it is most distinctive for its assumptions that agreement among *reasonable* citizens is the most that can be hoped for, and for the claim that on some fundamental matters the disagreement that does exist is owed to unreasonableness.

Waldron cites Rousseau and unnamed others as "always willing to suspect that a division into majority and minority factions is a sign that some or all are voting on a narrow basis of self-interest, rather than addressing issues of the common good in the spirit that deliberative models presuppose" (LD p. 92). Rousseau did not hold, however, that the absence of consensus was evidence that some citizens were failing to sincerely address the general will.[18] That would be to believe that there is simply no reasonable disagreement about what the general will requires. Rousseau did hold that majority rule's failure correctly to ascertain the general will was evidence of a failure by some citizens to address the general will rather than some more particular will such as their own or that of some other or smaller group or faction.[19] But this is entirely different.

Rousseau is the only philosopher cited as holding this "common" and "disturbing" view, though it is suggested that it is held by many proponents of "deliberative democracy." I know of no philosopher who holds this view as applied to matters of ordinary legislation. When it comes to matters of basic justice and legitimacy either there is actual agreement or not. And if there is not, then the disagreement is either all fully reasonable or not. But if it is, no position on justice or legitimacy is available according to the liberal account of political legitimacy. If philosophical anarchism seems implausible or worth trying to avoid, then the liberal account of legitimacy requires that some basis for justice or legitimacy be found on which the actual objections that exist are unreasonable. Waldron must either reject the No Reasonable Objection test, or accept Philosophical Anarchism if he is to avoid the commitment he criticizes here, namely the view that such disagreement as actually exists about any particular account of democratic legitimacy is owed to unreasonableness.

CONCLUSION

Let me conclude by briefly sounding an important theme of the book that I have neglected here. I share Waldron's view that democratic political theory has tended to neglect the reasoned and public spirited deliberative nature of majoritarian processes, at least as they

might be. He advances this cause without shying away from the natural questions it raises about traditional constitutionalism, and yet without departing from liberalism's conviction that there are individual rights that political decisions must not violate. Rights place limits on the just use of the majority's power. But, as he argues, the idea that any document or institution has supreme authority even over properly arranged democratic decisions is also troubling. I'm persuaded by Waldron that such institutional limits on the authority of democratic legislation need a better basis than the mere fact that the rights they protect are important. Because, of course, among the important rights is the right of a people to be self-governing. How legitimately to protect this right without destroying it is perhaps the most pressing practical question that Waldron's formidable theory of democratic authority raises.

NOTES

[1] This is an expanded version of comments delivered at the American Philosophical Association, Pacific Division Meetings, March 31–April 4, 1999 in Berkeley California. I benefited from the discussion there with Jeremy Waldron, and the other commentator, Tom Christiano.

[2] Oxford University Press, 1998; hereafter LD.

[3] Cambridge University Press 1999; hereafter DL.

[4] p. 12, p. 93: "people will continue to disagree in good faith …" See "good faith" also at p. 30. p. 112: "… it is not unexpected, not unnatural, not irrational to think that reasonable people would differ." p. 225: "No one in the trade now believes that … if two people disagree about rights, one of them at least must be either corrupt or morally blind." p. 268: "My theme in all this is reasonable disagreement …"

[5] See the following passages suggesting that Waldron accepts a version of Fair Proceduralism: 27, 41, 86, 114. And in DL147-162.

109ff uses the language of a "respectful decision procedure," and this respect for each citizens' deliberative capacities may seem to move away from mere procedural fairness. If so, it may well be a move in the direction I recommend toward an epistemic dimension. There may seem to be intermediate possibilities, such as some appeal to deliberativeness or rationality of the outcome rather than its truth or correctness. I argue in "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, (in Bohman and Rehg, eds., Deliberative Democracy, MIT Press, 1997) that such apparent alternatives resolve for critical purposes into the original choice between Fair Proceduralism and an epistemic approach.

[6] Robert Paul Wolff, *In Defense of Anarchism*, Harper Torchbooks, 1970.

[7] "Theoretical Foundations of Liberalism," in *Liberal Rights*, Cambridge University Press, 1993, pp. 56–57.

[8] See references in note 4.

[9] pp. 117–18. See also p. 110 for the evident reference of his term "authority ...in the constraining sense" at p. 117.

[10] Public comments at American Philosophical Association, Pacific Division Meetings, Berkeley, California, April 1999.

[11] See esp. LD Ch. 12.

[12] Waldron might hold that there is no reasonable objection to certain principles of political legitimacy, but there is reasonable objection to all practical proposals about actual institutions and laws. But unless there is some practical implementation of the principles that is beyond reasonable objection, the principles fail to justify any actual political power. Also see LD p. 15: "Disagreement on matters of principle is, as I have emphasized, not the exception but the rule in politics."

[13] My alternative is an epistemic approach. See his flirtations at, e.g., LD pp. 71–75, pp. 250–252; See also DL Chapter 5, "Aristotle's Multitude."

[14] There are different ways to set up this question but here's one (following Brennan and Lomasky, *Democracy and Decision*, Cambridge University Press, 1993): interpret my chance of being decisive under majority rule as the chance that apart from my vote all other votes would result in a tie (and so assume the total number of voters is odd, for simplicity). Let n be the total number of voters, and m be the number of voters minus me ($= n - 1$). Then my chance of being decisive in majority rule is:

$$\frac{\binom{m}{m/2}}{2^m}$$

Compare this to the chance of having one's own view pulled from the hopper in the lottery, which is $1/n$. It turns out that the chance of being decisive is always higher under majority rule than under the lottery.

[15] This can be seen by running some values of n (remember, $m = n - 1$) through the formula presented earlier.

[16] In science and in politics, we might use inductive inference from a procedure's ability to get the right answer in areas other than the one in question. This leaves entirely aside how those other truths came to be known. Still, such inductive arguments are within the category of formal rather than substantive epistemic approaches since they do not judge the method's reliability on the question at hand by evaluating its performance on the question at hand.

[17] There are other challenges for an epistemic approach, and I take some of them up in "Making Truth Safe For Democracy" (in *The Idea of Democracy*, ed. David Copp et al., Cambridge University Press, 1993, pp. 71–100) and "Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority" (in Bohman and Rehg, *Deliberative Democracy*, *op. cit.*).

[18] "For a will to be general it need not be unanimous." "On the Social Contract,"
Book II Ch. 2 note 1, in *On the Social Contract; Discourse on the Origin of
Inequality; Discourse on Political Economy*, Hackett Publishing Company, 1983.
[19] *Social Contract*, Book IV Chapter 1, paragraphs 5–7.

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