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Political Political Theory Theory

Jeremy D. Farris

William A. Edmundson

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Jeremy D. Farris[2] and William A. Edmundson[3]

INTRODUCTION

Political theory has not always been a self-confident discipline. In 1961, Isaiah Berlin, the Chichele Professor of Social and Political Theory at Oxford, wondered whether it continued to exist. His answer was irresolute. Berlin thought that political theory's existence was assured because it poses normative questions that are unanswerable by empirical political science.[4] Certain questions elude resolution by empirical observation—*e.g.*, How should scarce goods be distributed? Why should persons comply with law? What actions may a state permissibly coerce? Ironically, such normative questions also seem to have eluded Berlin. Instead of positing and defending a coherent set of answers to these questions, Berlin's approach to political theory was far more circumspect, concerned foremost to recite the history of answers supplied by the mighty dead, whom he chided for ignoring either the irreducible plurality of value or the mischievous tendency of "positive" liberty.

Then came John Rawls. After the publication of *A Theory of Justice* in 1971, Rawls's critic and colleague Robert Nozick wrote, "Political philosophers now must either work within Rawls's theory or explain why not."[5] Most have chosen to work within or against Rawls's framework, using tools supplied by analytic

1. University Professor, New York University.

2. D.Phil. (Oxon.), J.D. (Harvard), Law clerk to Hon. James O. Browning, United States District Court for the District of New Mexico.

3. Regents Professor of Law and Professor of Philosophy, Georgia State University.

4. Isaiah Berlin, *Does Political Theory Still Exist?*, *in* CONCEPTS AND CATEGORIES 143–172 (Henry Hardy ed., 1979).

5. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 183 (1974).

philosophy. The lion's share of the work has been focused on clarifying the meaning and requirements of justice and explaining the relationship of justice to other normative concepts. Representative of this tradition is G.A. Cohen, late Quain Professor at University College London and previously Chichele Professor at Oxford. Cohen began his Oxford graduate seminar on contemporary political philosophy by teaching that the subject, properly understood, concerned three distinct questions: What are the correct principles of justice? What should the state do? And which social states of affairs ought to be brought about?[6]

Today, those normative questions delineate much of the discipline of political theory. But compare those questions with this one: Are there decisive reasons for or against a supermajoritarian cloture rule in the upper chamber of a legislative assembly? Like Cohen's triptych of questions, the "filibuster question" is neither empirical nor legal, but straightforwardly normative. As such, the inquiry about the filibuster rule falls somewhere within the discipline-organizing question about what the state should do. Yet, having begun at Cohen's high level of generality, it is unclear how, or even if, the specific "filibuster question" will be addressed. This is because the general question—What should the state do?—leads naturally to subsequent inquiry about which goals states should pursue and what states must not do in their pursuit. From that point of departure, a political theorist likely proceeds to further discussion of the justification of those goals that the state should promote and the foundation of the rights that constrain state action. Political theory never gets to questions about cloture rules; unless, of course, it begins there.

And that is just what Jeremy Waldron has in mind. With the publication of *Political Political Theory*, the latest (though, not current) holder of Oxford's Chichele Professorship, now University Professor at New York University Law School, hopes to "encourage young political theorists to understand that there is life beyond Rawls" (p. ix). Although one may doubt whether the refocusing that Waldron has in mind really is to be found "beyond Rawls"—for Rawls was also deeply focused on the justification of democratic institutions—Waldron's meaning is clear: For those

6. G.A. Cohen, *How to do Political Philosophy*, *in* ON THE CURRENCY OF EGALITARIAN JUSTICE, AND OTHER ESSAYS IN POLITICAL PHILOSOPHY 227 (Michael Otsuka ed., 2011).

working in political theory, he says, there is life "beyond the abstract understanding of liberty, justice, and egalitarianism. . ." (p. ix). Instead of attempting to elucidate the meaning of our largest normative concepts, instead of testing the soundness of hypothesized normative principles against all manner of counterfactual thought experiments, political theory should focus on the evaluation of the rules and structure of state institutions.

I. THE REORIENTATION OF POLITICAL THEORY

With the exception of three chapters, the book collects part of Waldron's already-published work on law and political theory. Together, the individual pieces amount to a program to reorient the focus of political theory toward constitutional law and institutional design. For Waldron, political theory ought to be more concerned, in the first instance, with the design and justification of the institutions that comprise constitutional, democratic republics. This is what he means by calling for a return to *political* political theory. Three chapters, the first and the two last, frame Waldron's project—*viz.*, Chapter 1, "*Political* Political Theory" (pp. 1-22), Chapter 12, "Isaiah Berlin's Neglect of Enlightenment Constitutionalism" (pp. 274-289), and Chapter 13, "The Constitutional Politics of Hannah Arendt," (pp. 290-307). It is in these chapters that Waldron most clearly issues his call to refocus the task of political theory. There, he most clearly provides the reasons demanding a reorientation.

In a way, Waldron's call for reform seems to issue from the oak-paneled Senior Common Room. No one would seriously dispute that the United Kingdom is undergoing a period of constitutional change and institutional upheaval. Only a few reminders are needed: Brexit, the potential secession of Scotland or Northern Ireland, the establishment of the UK Supreme Court, the reform of the House of Lords, and the Fixed Term Parliament Act. There is a concern that the present curriculum of the "Theory of Politics" course, which is compulsory for Oxford's flagship Philosophy, Politics, and Economics degree, is not endowing its graduates with a better-than-par understanding of the normative issues involved in the United Kingdom's institutional transformation. Waldron suggests that the academies in the United States may be more attuned to institutional questions, given the acute public sensitivity to the countermajoritarian aspect of judicial review (p. 18). One would like to hope so;

however, we cannot help but wonder if American law students, much less undergraduates majoring in public policy or political science, are comparatively better prepared than their Oxonian counterparts to analyze analogous American institutional questions concerning, for example, the basis of reapportionment, the institutional actors responsible for redistricting, or the growth of executive power and the possible limits thereto. Perhaps American law students were at a comparative advantage during the days when the legal process school informed the curriculum, but those days have passed.

Waldron's project to reorient political theory toward questions of the value and design of institutions is not only motivated by the pedagogical concern that students of politics should be able to think through the institutional challenges that they will inherit. His call for reorientation seems to be motivated by a much darker concern—specifically, the threat posed to constitutional democracies by the concentration of executive power. We, the inheritors of "Enlightenment constitutionalism," should deeply understand how our institutions legitimate and channel the exercise of state power, lest we sign such power over to an executive who neither apprehends the values of constitutionalism, nor cares.

Hinting at this greatest concern, Waldron refers, both in the first and the last chapter, to Christian Meier's biography of Julius Caesar.[7] The reference illuminates what Waldron perceives ought to be political theory's animating fear. In the book, Waldron quotes Meier twice for the particular threat that Caesar represents:

> Caesar was insensitive to political institutions and the complex ways in which they operate …. He could see them only as instruments in the interplay of forces. His cold gaze passed through everything that Roman society still believed in, lived by, valued and defended. He had no feeling for the power of institutions … but only what he found useful or troublesome about them.… In Caesar's eyes no one existed but himself and his opponents.… The scene was cleared of any suprapersonal elements (pp. 14-15, 306).

The reader is to take the lesson that, from a certain viewpoint, those institutions that structure and limit state power

7. CHRISTIAN MEIER, CAESAR 358–59 (David McLintock trans., Basic Books 1995) (1982).

may be *de-reified*—that is, seen through, as really nothing more than the individuals who comprise them and, thus, as nothing more than sets of friends or enemies. Once the institutions that separate and protect individuals from concentrated executive power are bathed away, warns Waldron, what remains is politics at its most unmediated and perilous. Once institutional bulwarks are discredited and are seen to be nothing more than "parchment barriers" after all, only unmediated power remains.

Such unmediated power can manifest in different forms. For instance, it can be highly concentrated in the executive branch. Waldron succinctly characterizes the view of the executive who, like Caesar, successfully devalues, discredits, and even "sees through" the institutions that previously existed to constrain his or her power: "Now there is just you, and me, and the issue of my greatness" (p. 15).

By contrast, the unmediated power that threatens constitutional institutions may also be highly diffuse. The political action characteristic of mass movements that express impatience with and suspicion of representation, political parties, and parliamentary procedure, is no less pathological for being diffuse. Waldron offers a formulation that captures exactly what is so terrifying about mob rule when the de-reification and disappearance of constitutional structures is complete: "Now there is just you and me and our interest in justice" (p. 15).

For Waldron, either way, the emergence of unmediated power heralds the end of both constitutional government and the preconditions for deliberative democracy. Whether shaped by a Caesar or by a Jacobin mass, the de-institutionalized landscape lies worlds away from the green and pleasant fields of constitutional democracy. Waldron's implication for the activity of political theory is unmistakable: because the *raison d'être* of modern, constitutional republics is to prevent exactly the emergence of such unmediated power, so too should it be the organizing concern of academic political theory.

Waldron claims that the channeling, and thus the avoidance, of unmediated power was the also the organizing project of *Enlightenment constitutionalism*—"one of the most important achievements of the eighteenth century Enlightenment" (p. 274). Under the banner of "Enlightenment constitutionalism" we may group a core set of interrelated, institutional ideas that, although having previously emerged, became clear in the late eighteenth

century. In abbreviated statement, they are: (1) the premise that sovereignty, *i.e.*, the ultimate authority to make and enforce law, inheres in the People itself (or themselves); (2) the notion that a constitution is fundamental law—distinct in both prestige and pedigree from ordinary legislation—and that such fundamental law grants and limits the powers of government; (3) the idea that the powers of government are susceptible to both definition and separation and, accordingly, may be located in different branches; (4) the commitment to the idea of actual, not virtual, representation of the People by government, such that governmental actors may be understood to be agents of specific groupings of the People and subject to their direction and recall; (5) the conviction that the People have rights against some types of governmental interference and that those rights are enshrined in fundamental law; and (6) the empowerment of the judiciary to review the actions of other branches of government for conformity with the powers both granted and limited by the fundamental law.[8]

Waldron identifies the main current of the history of political theory as the genealogy of exactly this set of ideas, whose canon he bookends with Locke's *Two Treatises of Government* (1680) and the constitutional sections of Kant's *Rechtslehre* (1797). Belonging to the canon, Waldron includes the writings of Madison, Sieyès, Voltaire, Diderot, Paine, Jefferson, Condorcet, Hamilton, Montesquieu, and Rousseau (p. 276). What these disparate members of the Enlightenment pantheon shared, first and foremost, was a predominant interest in the institutions of government and how those institutions channel political power to preclude tyranny. Their shared project concerning the makings of constitutional theory is the most significant tradition of political thought in the Enlightenment or since. Thus, *Political Political Theory* not only contains a call for reorientation in the objects of theory, but also suggests that the way the history of political thought is conceptualized and taught is also due for realignment.

And so, it is Isaiah Berlin—the much celebrated historian of ideas—who is the object of special criticism for neglecting Enlightenment constitutionalism in his ambitious but desultory writings. After "ransacking" this *oeuvre*, Waldron concludes that

8. *See generally* Gordon Wood, *The Origins of American Constitutionalism*, *in* THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 171-187 (2011).

Berlin, at best, was just not interested in questions about institutional structure. Furthermore, Waldron holds Berlin responsible in part for the neglect of institutional concerns in political theory as it is conducted and taught in the United Kingdom. That might be unfair, and it likely overemphasizes the contribution of a single academician, even Berlin. In any event, as Waldron impishly puts it, "[t]he old man's reputation can take it" (p. 289).

II. THE ACTIVITY OF POLITICAL POLITICAL THEORY

How then does *political* political theory approach questions regarding the design of political institutions? From the book's title, empirical political scientists might understand Waldron to be offering some appreciation of the importance of empirical and quantitative analysis in the study of choices that various polities face in the area of institutional design. They would be disappointed. The book contains very little in the way of empirical or quantitative analysis that might guide inquiry into institutional design. Even if it proposes to be *political*, "political political theory" remains *theory*, through and through.

Not that the aloofness from empirical work is necessarily grounds for objection. Much in *political* political theory is exemplary of what, by now, amounts to "best practices" in political theory, as it is conducted in analytically attuned philosophy and political science faculties. Waldron's most often-used tool is common to (not-especially-political) political theory—namely, straightforward conceptual analysis to illuminate and parse variations in the meanings of our normative concepts. It is just that in *political* political theory, the lens of conceptual analysis is turned toward institutional concepts that have received comparatively less attention than the marquee concepts of justice and liberty.

The value of such conceptual analysis is easy to underestimate. The illumination and arrangement of institutional concepts gives clarity and precision to normative argument about institutional design. It also permits us to consider options in the design of political institutions that might have remained hidden from view, behind some elision or equivocation. For Waldron, this is the major lesson of Locke's dissection of the executive power in the *Second Treatise*—"to disaggregate and analyze the different powers traditionally assigned to the Crown, to identify the limits

to each one, and to make sure that the Crown does not escape these limits by blurring the public's understanding of its various functions" (p. 92 n. 78). Locke's analysis of the different components of the executive power was a necessary step for subsequent development in the argument for the separation of powers and the accountability and oversight of the executive.

Throughout the chapters, Waldron deploys the tools of conceptual analysis, dissecting the "theoretical anatomy" of our political institutions—legislatures especially—in thought-provoking ways. For example, the chapter entitled "Representative Lawmaking" separates the features of legislation that make it a distinct form of lawmaking, as compared to the lawmaking by judges and executive agencies, treaty, or custom (pp. 125-144). Better still, the chapter entitled "Accountability and Insolence" which is first published in this collection, offers an abbreviated "anatomy lesson" in republicanism (pp. 167–194). Republicanism, in its most encompassing definition, is the view "that the business conducted by government is the public business … rather than the patrimony of any privileged individual or family" (p. 175). Waldron cleverly uses the legal concepts of trust and agency to analyze variations in republican thought regarding the relationship between the government and the People.

On the one hand, republican government may be structured along the lines of a trust, wherein a settlor establishes a legal entity for the advantage of a beneficiary and empowers a trustee to act for the beneficiary. Although the beneficiary (the People) may hold the trustee (the government) accountable in certain ways that are formally structured according to the terms of the settlement, the beneficiary may not instruct or remove the trustee. There may be several lines of accountability in which one office of government formally oversees another office to verify that the latter is acting for the People's benefit in accordance with the terms of the settlement. The government as trustee, however, is not directly responsive to the People: neither may the People instruct the government, nor may government officials be directly called to account or replaced by popular demand. Waldron associates the trust model of republican thought with the structure of the Venetian republic where, as he reads the history, the public was the beneficiary of the official conduct and the work of the officials was scrutinized by the senate for compliance with the rule of law and civic virtue (pp. 176-177).

On the other hand, a republican government may be better explained by the concept of *agency*, in which an agent (the government) acts on behalf of a principal (the People). Under the agency model, the principal may call the agent to give an account of the agent's actions taken on behalf of principal, and the principal may sanction or replace or terminate the agency relationship. The analogy might even extend to include a principal's power to instruct the agent and the agent's duty to keep the principal informed. This agency model of republican thought introduces a particularly democratic form of accountability, and Waldron points (p. 177), as an example, to Madison's description in Federalist 57 of the comparatively short term of electoral office in the House of Representatives:

> [T]he House of Representatives is so constituted as to support in the members a habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.[9]

The trust and the agency models of the accountability of government in republican thought are predicated on very different premises about the relationship of a people and a state that governs them. Under the agency model, the state belongs to the People; it is not just set up for their benefit. Therefore, the agency conception of republicanism entails the need to establish democratic structures by which the People themselves can actively demand an account of, if not instruct, their agents in government because the government acts for them and in their name. The trust model, by contrast, does not begin with a premise of popular sovereignty. Nor does it necessarily entail democratic procedures.

Waldron's use of the legal concepts of trust and agency as analogies for thinking about the state is not novel (and the book makes no reference to Maitland), but these analogies shine light on conceptual variations of accountability. They also prompt questions regarding the accountability of our own institutions. For

9. THE FEDERALIST NO. 57 (James Madison).

example, Waldron invites the reader to ponder whether the federal judiciary in the United States is better described in terms of the trust or the agency model of accountability.[10] He suggests that the exercise of judicial review of legislation is a "mediated form of democratic accountability" in which "court procedures operat[e] insistently to require legislators and other officials to give an account of themselves. . . ." (p. 193).

If by a "form of democratic accountability" Waldron means to refer to an agency-based characterization of the accountability of the federal judiciary, this view is doubtful. The relationship between the federal judiciary and the People is arguably better reflected by the trust analogy. Judicial review of legislation for conformance with both the powers and the individual rights conferred by the Constitution appears more akin to the internal oversight of trustees who ensure that some directors act in conformance with the settlement and for the beneficiary's interest. Federal judges are not subject to popular instruction or to recall by popular will. Nor is it obvious that judges are, in any significant sense, representatives. Moreover, at least some federal judges on the highest bench have denied it. For example, when interpreting the ordinary meaning of "elected representatives" in a federal statute to exclude judges, the late Justice Scalia, joined by two other Justices, flatly said that "judges are not representatives."[11] This pronouncement, at least with respect to federal judges, might easily command agreement: The People cannot easily call federal judges to account for their exercise of the power of judicial review, even through their representative agents in Congress. Nor can the People replace them or easily terminate their tenure. However, the defensibility of Scalia's view with respect to state judges who are subject to periodic partisan or recall elections (or both) is more complicated. The accountability of democratically controllable state judges may tend more toward the agency-based model.

In addition to conceptual dissection, which Waldron does deftly and innovatively, another common movement in normal political theory is to stake out a set of normative principles and

10. The question is latent in *The Federalist* No. 78, in which Hamilton writes that it is "rational to suppose … that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST NO. 78 (Alexander Hamilton).

11. Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

then evaluate some state of affairs by reference to those normative principles. Often in political theory this move involves the evaluation of some distribution of benefits and burdens under some principle of distributive justice. Surveying Waldron's disparate book chapters, this movement also occurs in *political* political theory, but there the normative principles staked out are geared to evaluate some aspect of institutional design.

So, for example, in "Principles of Legislation," Waldron maps out seven principles by which we may evaluate the legitimacy of legislation (pp. 149-150). By legitimacy, we mean that the law admits of a justification for compliance that might reasonably be demanded by those persons whose preferences or moral views were not enacted. As Waldron notes, the concept of legitimacy has a "more focused aspect … to reconcile the losing party in particular to the decision that has been made" (p. 255). A lawmaking procedure increases in legitimacy—that is, it produces laws that better satisfy the demand for a justification of coercion—to the extent it satisfies such "principles of legislation." Under these principles, a law is more legitimate to the extent that it is (1) made explicitly (2) by representatives, who (3) take due care, (4) deliberate, (5) respect disagreement and (6) respect formality in decision-making, and is the outcome of (7) majority decision. Waldron posits this non-exhaustive set of values as especially appropriate to evaluate whether a particular procedural rule increases or decreases the legitimacy of laws that are the outcome of legislative procedures the rule, in part, comprises.

Now, these individual principles can point in different directions with respect to how a particular procedural rule contributes to, or detracts from, the legitimacy of law. To complicate matters further, a rule's satisfaction of one principle may depend on the satisfaction of other principles. Consider the above-mentioned Senate filibuster rule, Senate Rule XXII, and the evaluation of that rule under Waldron's "principles of legislation." A supermajoritarian cloture rule in effect requires a supermajority vote for the passage of legislation, thus failing to satisfy the majoritarianism principle and, consequently, detracting from the legitimacy of the procedure of which it forms a part. Yet, in so doing, the same supermajoritarian cloture rule might also render a law-making procedure more deliberative and more respectful of disagreement, and thus might add to the

legitimacy of the laws it works to produce. But these legitimacy-conferring benefits of a supermajoritarian cloture rule depend on how the rule is invoked and received by the legislators on all sides of legislative debate. Hence, the legislators' respect for the formality of the procedural rules and the legislators' satisfaction of their duty to take care also inform whether a supermajoritarian cloture rule adds to or detracts from the legitimacy of law.

This abbreviated evaluation of the filibuster rule is offered as an example to suggest that the full normative analysis of procedural rules might become quite complicated. The satisfaction of "principles of legislation" by any given procedural rule will likely be interdependent, polycentric, and fact-sensitive. In the chapter devoted to "principles of legislation," Waldron does not investigate the legitimacy of any particular procedural rule in light of the particular principles he stakes out. Rather, he offers a way of evaluating "the rulebook" in a light that is distinct from an analysis about the outcomes of the legislative procedure—statutes and their effects on the distribution of benefits and burdens. In so doing, Waldron anticipates the shape of normative arguments about choices we encounter in the design of a law-making institutions. After all, *Political Political Theory* is meant to be a paradigm-introducing work, not a commentary on, say, Riddick's *Senate Procedure*.[12]

III. POLITICAL POLITICAL THEORY AND NON-IDEAL THEORY

Like the empirical political scientists who may be tempted by the book's title, other readers may come to Waldron's book with forgivable yet incorrect assumptions about his project. From its calling card, one might suspect that *political* political theory will differentiate itself as offering a non-ideal version of political theory. Non-ideal theory seeks to offer normative principles about what the state should do, and what the obligations of citizens are, given that the current state of affairs is deeply unjust, that we can realistically expect that individuals will, at best, only partially comply with the demands of justice, and that a just distribution of benefits and burdens might not be accessible from *here*. In a sense, non-ideal theory takes people as they are and

12. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES (Alan S. Furmin ed., 1992).

laws as they might be; however, depending on the assumptions about people as they are—and particularly that set of people who aspire to public office—that Rousseauvian methodological premise can result in a political theory that is deeply interested in questions of institutional design in order to achieve stability, not justice. And the worse one assumes people to be (and, again, especially those people who aspire to public office), the greater the emphasis on a theory of politics that privileges stability.

Think, for example, of the premise that Hume advised in questions of constitutional design:

> Political writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought supposed to be a knave, and to have no other end, in all his actions, than private interest.[13]

The purpose of the person-as-knave design principle serves to protect governmental institutions from the ambition of the people who inhabit them. Madison also made reference to the knavery principle in his argument for the ratification of the federal constitution: "Ambition must be made to counteract ambition … it may be a reflection on human nature, that such devices should be necessary to control the abuses of government."[14]

Waldron references Hume and Madison's non-ideal interest in institutional design very early in the book to give a sense of the institutionalist turn he believes is required of political theory. But unlike the aforementioned passages, Waldron's argument is *not* that normative theory should be more concerned with questions of institutional design because he believes that persons are knaves and, therefore, political theory should focus on how institutions can embank and direct the currents of their self-interest and irrationality. To the contrary, Waldron resists approaches to questions of institutional design that begin by taking people as they are, in the pejorative sense. To see this in the round, it is helpful to recall Waldron's skepticism of the latest deployment of a kind of knavery principle in popular writing about questions of institutional design.

13. David Hume, *On the Independence of Parliament*, *in* ESSAYS: MORAL, POLITICAL, LITERARY 42 (Eugene F. Miller ed., Liberty Classics 1985) (1742).

14. THE FEDERALIST NO. 51 (James Madison).

The knavery premise is not limited to great questions of constitutional design, posited with the purpose to preserve constitutional structures and to achieve stability. Rather, the same knavery premise has lately been employed, albeit in a slightly modified form, in the design of governmental institutions to promote various welfare-related ends. Imagine, then, that people are not only knaves, concerned only with their private interest, but also that they are not very capable of making decisions that best promote their interest. In short, imagine persons are unclever knaves. Confronted with a world populated with unclever knaves, so-called libertarian paternalists like Cass Sunstein recommend that government ought to ensure the design of a choice architecture that leverages the unclever knaves' heuristics, biases, and laziness in ways that promote their interest. So, for example, because unclever knaves must save something for retirement, the government should ensure that employee 401(k) savings plans are not only offered, but that both enrollment and a certain contribution level are the default position, subject to an opt-out. And because unclever knaves must also eat lunch, the lunch staff should ensure that the broccoli appears first in the lunch line, where one has to request a tray or large cup. In other words, "nudging," a well popularized approach to governmental regulation, assumes a form of the eighteenth century methodological assumption of person-as-knave.

Beyond the pages of the book under review, Waldron has expressed skepticism of "nudging" exactly because that theory of government regulation views persons as little more than unclever means toward their own ends, a view that falls far short of how government ought to apprehend and to respond to the dignity of persons.[15] While *Political Political Theory* begins by adverting to Hume's and Madison's use of the knavery premise as a ready example of thinking about institutional design, Waldron is quick to recommend that the design of government institutions should be evaluated not only according to how those institutions promote interests, but also according to how political institutions respect the voice and dignity of citizens. Waldron says, "It is people's capacity for judgment that is at stake when we look for a democratic mode of lawmaking and if we are to respect that capacity, we must respect the forms, structures, and processes that

15. Jeremy Waldron, *It's All for Your Own Good*, N.Y. REV., Oct. 9, 2014, at 21–23.

can house and frame it" (pp. 141-142). This passage amounts to a rejection of approaches to the structure of governmental institutions that begin from a knavery premise, and it is of a piece with Waldron's suspicion about "nudging."

These sidebar comments about Waldron's reaction to the emphasis on "nudging" allows an important insight into the paradigm he offers: in an important sense, political political theory is not non-ideal at all. Its approach to the design and evaluation of political institutions is not premised on human failings. Nor does it begin with the recognition of unavoidable facts that constrain the achievement of justice. Moreover, political political theory is not especially interested in evaluating the design of political institutions by reference to their achievement of a particular social goal. Political political theory is not, in the first instance, interested in welfare-denominated patterns of distribution.

Waldron asks us to understand the value of political institutions beyond their instrumental value in promoting some independent end. Unlike Hume's and Madison's maxim to understand institutions as means to control the ambition of the participants, and unlike the soft paternalists who, aware of our biases and inertia, understand institutions as means to more efficiently promote our interests, *political* political theory challenges the theorist to see the worth of institutions beyond their ability to promote some independently valuable state of affairs. The value of political institutions lies, at bottom, not in the distributive outcomes they produce, but rather in their ability to enable the ultimate sovereignty of the People by ensuring democratic participation and government accountability. In other words, it is most important that political institutions are designed to achieve legitimacy, even if not justice.

The focus on the value of political institutions that exists apart from the justice of the laws they enact and enforce, is connected with political political theory's motivating concern about a Caesarian executive who, neither understanding nor caring for the importance of constitutions, is able to "see through" institutional entities. Political political theory suggests that understanding the value of political institutions primarily by reference to their legitimacy makes those institutions more concrete, such that they cannot be easily de-reified or suddenly made to disappear. And making institutions more concrete—*i.e.*,

reifying institutions that are born of parchment—is an imperative in view of their proper normative justification, which regards them as valuable in ways that are not necessarily connected to their outcomes. This is the central thesis of *political* political theory and the single theme that unites Waldron's disparate essays on institutions.

Concerns about accountability, voice, and dignity are latent in relationships not only between political institution and persons, but also as between institutions themselves. Waldron introduces this point by reference to William Forbath's *Law and the Shaping of the American Labor Movement*,[16] where Forbath reviews the history of judicial review of progressive-era labor legislation. After labor organizers and sympathetic legislators successfully enacted statutes regulating hours and conditions, the courts invalidated them as unconstitutional. The frustration of those in the labor movement was immense: "I would kill them all and see if that would be considered unconstitutional."[17] Waldron's emphasis is not that the exercise of judicial review in this period was a setback for the justice of the labor legislation enacted by progressives (although he does not deny that); rather, his emphasis is on the disrespect of the legislative institutions shown by some members of the judiciary. Although the workers had grounds to complain of injustice suffered, Waldron suggests that an equal, if not deeper, concern is the indignity and disrespect that governmental participants in one branch accorded to the work of another. There, the legislative institutions—the voices and concerns they amplified—were seen as a nullity, were seen through, were made to disappear. And that disrespect of a representative lawmaking institution should leave an impression as deep as the injustice in the distribution of benefits and burdens that the laborers were forced to bear.

IV. A LIFE BEYOND RAWLS?

For all its emphasis on the design of representative institutions to ensure their legitimacy, *Political Political Theory* has surprisingly little to say about the pervasive power, and tendency, of money to corrupt institutions and officials and to

16. WILLIAM FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 47 (1991).

17. *Id.*

erode political legitimacy.[18] In these essays, he ignores the corrupting influence of money not only in general but also where it is obviously pertinent to his specific treatment of alternative institutional designs. For example, the choice between unicameral and bicameral legislatures is fraught with consequences for the economically less-advantaged citizen. A second legislative chamber creates an additional "veto point" likely to obstruct—in fact, typically intended to obstruct—the will of electoral majorities, particularly when that will is directed toward redistributive ends.

The problem of money in politics is not a merely valetudinarian concern. Alfred Stepan and Juan Linz have shown that there is a striking correlation between an increasing number of veto points in a constitutional structure and an increased pattern of economic inequality.[19] The greater the number of veto points, the more likely that greater private economic resources may be converted into unequal opportunities to shape legislation. A political theory attentive to questions of institutional design should not ignore empirical studies about the myriad ways that the hydrologic pressure of money might break through to influence the functioning of political institutions.

Waldron promises "life beyond Rawls," but the book distracts attention from the central and truly hard problem of institutionalizing constitutional democracy, the problem that Rawls despairingly once called "the curse of money."[20] A constitutional democracy will inevitably generate unequal wealth, just as it will inevitably engender a plurality of incompatible but equally reasonable comprehensive conceptions of the good life. As Rawls explained, these circumstances are inherent to the operation of a liberal constitutional democracy over time. They do not merely derive from the version of the knavery principle that Waldron excusably elects to set aside. Moreover, unlike the fact of reasonable pluralism, disparately greater amounts of

18. Granted, Waldron does, in passing, deplore the "conservative strategy of appropriating the rule of law as an ideal for something like an IMF/World Bank agenda, which sees its aim as that of securing property rights and external investment against legislative encroachment" (p. 33).

19. *See* Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 PERSP. POL. 841, 841–56 (2011); *see also* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. POL. 564, 564–81 (2014).

20. JOHN RAWLS, THE LAW OF PEOPLES 139 (1999).

wealth tend inevitably to impart political advantages. The tendency of political institutions necessarily to create the conditions for unequal political influence is not a fact that a political political theory can ignore. An utter disregard of the money problem is *Political Political Theory*'s most glaring omission. Waldron chides "Rawls and his followers" for failing to understand that the burdens of judgment apply to "issues of justice and social policy" as well as to "religion, ethics, and comprehensive conceptions" (p. 94). Set aside the question whether this charge is adequately substantiated by what Waldron has "written elsewhere" (one of the more common phrases in the book); it does not even begin to illuminate why he has chosen to ignore the money problem when setting out a political political theory.

Waldron laments that Berlin's "lack of interest in institutions and constitutions has turned out to be contagious." Yet, Berlin's inattention was not singlehandedly responsible for political theory's excessive focus on the meaning of concepts such as justice or liberty, to the exclusion of thinking about institutional design. "This," according to Waldron, "is something that would have happened any-way, *under the influence of Rawls*…" (p. 288, emphasis added). This is an astonishing claim. And this passage, along with the book as a whole, reflects an almost reckless misunderstanding of Rawls. Rawls deliberately chose not to bookend "Enlightenment constitutionalism" between Locke and Kant. Rawls chose not to, in part, because he read Marx as a friendly critic rather than an implacable foe of this very project. Just as Berlin had no serious interest in institutions, Waldron shows no serious interest in "the curse of money," not even to acknowledge it by expressly setting it aside. Unlike Rawls, Waldron, at least in this collection, shows no interest in how institutional and constitutional designs might cabin (or "house") the money problem without squelching liberty.

True, one might plead realism on Waldron's behalf. The United States Supreme Court, in a line of decisions running from *Buckley v. Valeo*[21] to *McCutcheon v. Federal Election Commission*,[22] has declared that the Constitution forbids Congress to legislate with the aim of promoting what Rawls called

21. 421 U.S. 1 (1976).
22. 134 S. Ct. 1434 (2014).

the "fair value of political liberty"—*i.e.*, a roughly equal actual (not merely formal) chance of each citizen to affect political outcomes.[23] But political theory is not constrained by what the United States Supreme Court happens to have held; the discipline has aspirations about choices in institutional design that go beyond the constraints on what may be reasonably advocated for in a legal brief. And Waldron does not say that Rawls's concern about fair value, and with the institutional devices that might assure it, is utopian or passé. In fact, he does not mention the Rawlsian institutionalist concern with fair value at all. This quiet insouciance about the problem of reconciling political equality and economic inequality gives the collection not merely a debating-society flavor, but also an ideological tinge.[24] If it is a taste of "life beyond Rawls," one must ask whether it is a way of life a political theorist—especially a *political* political theorist—ought to be living.

The "curse of money," then, is not only a justice problem. It is also a legitimacy problem. There is no reason for political political theory, which, as Waldron convincingly shows, is a fruitful and necessary corrective for contemporary political theory, not to address it as such.

23. In an uncharacteristicly overt tone of despondence, Rawls wrote, "Historically one of the main defects of constitutional government has been the failure to insure the fair value of political liberty. The necessary corrective steps have not been taken, indeed, they never seem to have been seriously entertained." JOHN RAWLS, A THEORY OF JUSTICE 198–99 (rev. ed., Harvard University Press, 1999). It would be tragic, we think, if political theory, under the guise of realism, were to internalize this attitude.

24. "[P]olitical philosophy is always in danger of being used corruptly as a defense of an unjust and unworthy status quo, and thus of being ideological in Marx's sense. From time to time we must ask whether justice as fairness, or any other view, is ideological in this way; and if not, why not?" JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 4 n. 4 (2001).