

Why Jeremy Waldron Really Agrees with Me

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I am grateful to Professor Jeremy Waldron for his intelligent and generous review of my book and to the editors of the Harvard Law Review for providing me with this opportunity to respond. If I understand Waldron correctly, he is in general agreement with my critique of our constitutional practice but purports to have serious reservations about my proposed solution and about how one might get to the solution even if it were a desirable place to go. I have a few quibbles about Waldron's description of my project, which I detail in a footnote.¹ The rest of this reply is devoted to Sections II and III of his review, which he labels "Normative Prescriptions" and "Constitutions in General." I argue that, despite what Waldron thinks, there is virtually no gap between our positions.

For expository reasons, I reverse the order in which he discusses these questions.

I. Constitutions in General

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¹ Waldron accuses me of inconsistency because I complain both that political actors manipulate constitutional doctrine to reach results that they desire and that they too often unthinkingly defer to constitutional settlements. See [cite to P. 4 of Waldron review]. The two points are fully consistent because different parts of the Constitution are, respectively, open textured and precise. Constitutional language that is open textured – for example the equal protection and due process clauses of the fourteenth amendment – is often manipulated to achieve political ends. Constitutional language that is precise – for example the provisions establishing the Electoral College and representation in the Senate – is almost always treated as settling issues that should be unsettled.

Waldron claims that I am "really a sort of 'philosophical anarchis[t]'" – that is, a person who rejects an obligation to obey any sort of law. [Cite to P. 19 of Waldron review] But although I have some sympathy for philosophical anarchism, See *On Constitutional Disobedience* at 119 (noting that "there is much to say in support" of it) I have not taken a firm stand on the issue. See *id.* at 121 (noting that because communities must have law, it makes some sense to obey the law and that transactional theories of political responsibility have some intuitive appeal). For some further, inconclusive musings on the subject, see Louis Michael Seidman, *Political and Constitutional Obligation*, 93 B. U. L. Rev. 1257 (2013). In my book, I argued that whatever one thinks about general political obligation, there are sound reasons to reject constitutional obligation. See *On Constitutional Disobedience* at 120-123.

Relying upon the constitutional experiences of the United Kingdom and New Zealand and the new constitutions of countries like South Africa, Poland, and East Timor, Waldron doubts my claim that the United States would be better off if it gave up on constitutional obedience.² Perhaps I am not understating the seriousness of Waldron's objections, but I believe that they are mostly or entirely attributable to confusion about exactly what my claim is – confusion that, no doubt, is the fault of my bad writing rather than of his bad reading.

First, I should have made clearer that my book is not intended as a work of comparative or general constitutional law. I make passing reference to the constitutional experiences of New Zealand and the United Kingdom,³ but only to help refute the contention that the United States would necessarily collapse into chaos and tyranny in the absence of constitutional obedience. The principal focus of my book is on the United States Constitution and on how it functions in twenty-first century America.

As I have argued in other work⁴ but should have made clearer in this book, the worth of constitutions and of constitutional law must be judged contextually. In some circumstances, constitutions can end devastating conflict, promote deliberation, or help achieve national liberation. When constitutions accomplish these goals, they should be celebrated rather than attacked. Unfortunately, the American Constitution as applied to our current situation accomplishes none of these goals. If I were forced to generalize beyond the American Constitution itself, I would say that my critique of constitutional obedience takes hold in a context where

- The constitution in question is very old;
- It is extremely difficult to amend;
- It was the product of compromises over issues that are no longer politically salient;

² [Cite to Waldron review at 17-20, 22-23].

³ On Constitutional Disobedience at 18, 115, 126.

⁴ See Louis Michael Seidman, *Acontextual Judicial Review*, 32 *CARD. L. REV.* 1143, 1170 (2011) (“In different contexts, constitutionalism . . . will be a more or less worthy project”).

- It has provisions that fit badly with contemporary politics and culture and that are seriously unjust or otherwise problematic;
- It exacerbates ordinary political disputes by allowing people on all sides to accuse their adversaries of constitutional disobedience when they disagree about matters of policy;
- It channels debate into deeply irrelevant argument about constitutional doctrine rather than about the practical, moral, and political questions that should drive public policy; and
- The country in question already has in place well established customs, traditions, and ways of doing things that will structure its decision making in the absence of constitutional law.

These are attributes of the United States and of the American Constitution. So far as I know, they are not attributes of the constitutions of South Africa, Poland, or East Temor.

Second, Waldron disputes my claim that the United Kingdom and New Zealand have functioned successfully without written constitutions. On his account, these countries have “a lot of written constitutional law.”⁵ But this assertion, and the dispute between us that it gives rise to, rests entirely on Waldron’s definition of “constitution.” On his account, a constitution is “just the set of rules and principles that organize the fundamentals of that country’s political system, constitute and empower the most important institutions, and structure what various government agencies may or may not do.”⁶ These norms, he claims, can be unwritten and can consist of no more than customary rules or precedents or “scattered” legislative texts.

Definitions are conventional, so if Waldron wants to define “constitution” in this way, I have no quarrel with him. Still, there is a problem here. When the controversy over waterboarding began, President Bush definitively asserted that the United States does not torture.⁷ Having defined torture as that which the United States does not do, it logically followed that the various practices the United States engaged in were not torture. I fear that Waldron’s definition of “constitution” accomplishes an analogous purpose. If one defines “constitution” to encompass all arrangements that are necessary to

⁵ [Cite to Waldron Review at 17]

⁶ Id. at 18.

⁷ See “Transcript: President Bush’s Speech on Terrorism,” N.Y. Times, 9/6/06.

insure state functioning and stability (something that Waldron's definition comes close to doing), then it logically follows that states cannot function or remain stable without constitutions.

In my book, I chose not to define the term this broadly. Instead, I wrote about the American Constitution – a single, written document that is very old, that is formally and deeply entrenched against change, and that is popularly treated as defining the polity. I tried to make clear that we need not fear the consequences of disobedience to the American Constitution precisely because we already have in place a network of customs, rules, precedents, and legislative texts that would adequately structure our politics if the American Constitution were disregarded.

Waldron can call this network a “constitution” if he likes, but his own argument shows why it is important to distinguish between this sort of informal “constitution” and the actual American Constitution that I criticized. Informal constitutions may be politically entrenched, but they remain open to change through ordinary processes when advocates persuade people that they are unjust, ineffective, or outmoded. For example, as Waldron points out, the United Kingdom has succeeded in very substantially reforming the House of Lords.⁸ In contrast, because the United States Constitution is legally entrenched, reforming the United States Senate is a practical impossibility.

I think that Waldron agrees with me that the sort of informal “constitutions” that inhibit endless fights about the rules of the game are necessary and important. I think he also agrees with me that the United States Constitution, replete with evil and archaic provisions that as a practical matter are unchangeable, produces serious pathologies. If we really do agree about both of these points, then I am unsure what of consequence we disagree about.

II. Normative Prescriptions

Professor Waldron wishes that I had said more about how to achieve the changes that we both seem to favor. I too wish that I had said more. I wish that I had more to say. I hope it is not churlish to

⁸ [Cite to Waldron Review at 21]

point out that the explanation of how to get from here to there is also underdeveloped in Waldron's own work about judicial review.

In any event, I can say at least this much: The United States Supreme Court is not about to announce that henceforth it will disobey constitutional commands, and Congress is not about to enact legislation formally disavowing the Constitution. Moreover, here as elsewhere, unilateral disarmament is a bad idea. It makes no sense for one side to forego constitutional argument while the other uses it to its advantage.

If there is to be change, then, it must first be on the cultural level, and cultural change occurs one conversation at a time. If there are to be conversations, though, the issue must first be salient, and right now it is not. To claim that my book, read by a tiny number of people, the vast majority of whom disagree with it, will make the issue salient would border on clinical narcissism. Putting the issue on the table requires action by culturally significant figures.

Is it possible that there will be such action? Consider the following: During the recent controversy over the debt ceiling, President Obama's spokespeople stated repeatedly and forcefully that he lacked the constitutional power to ignore the ceiling.⁹ Some well-known scholars disagreed and advanced elaborate constitutional arguments explaining why the President had this authority.¹⁰ Significantly, however, other important figures argued that he should disobey the Constitution if doing so was necessary to the country's wellbeing.¹¹

⁹ See, e.g., Jackie Calmes, "Obama Will Not Unilaterally Raise Debt Limit," N.Y. Times, 10/3/13 (quoting Press Secretary Jay Carney); Jackie Calmes & Jeremy W. Peters, "Boehner Hews to Hard Line in Demanding Concessions from Obama," N.Y. Times, 10/6/13 (quoting Treasury Secretary Jacob Lew).

¹⁰ See, e.g., Neil H. Buchanan & Michael C. Dorf, *How To Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012).

¹¹ See Henry Aaron, "Our Outlaw President? Obama Should Ignore the Debt Ceiling," N.Y. Times, 9/29/13 (arguing that the President should ignore the debt ceiling even though doing so would violate the Constitution); cf. Adam Lipkav, "Experts See Potential Ways Out for Obama in Debt Ceiling Maze," N.Y. Times, 10/3/13 (quoting law professor Eric Posner to the effect that President has inherent emergency powers to act to save the country).

Suppose that the Republicans had held their ground and that the American economy was spiraling toward catastrophic collapse. It is deeply implausible that the President would have done nothing to meet this crisis. I suppose it is possible that he would have disavowed his many earlier statements that he lacked constitutional authority to act. But it is at least as plausible that he would instead have announced that, like Jefferson and Lincoln before him,¹² he would not let constitutional language obstruct measures that were necessary to the wellbeing of the republic.

Had Obama said this, the issue of constitutional obedience would indeed have been salient. Of course, he did not say it, and we have no way of knowing whether he would have said it if push had come to shove. Nor can we know whether future events will cause important figures to make similar statements. We do know, however, that a growing number of people treat the Constitution as an obstacle to get around rather than a guide to action.¹³ Moreover, the deep reverence Americans express for the Constitution in the abstract rests uneasily with an equally deep cynicism about its concrete use in ordinary political debate. This situation is not stable and creates at least the possibility of radical change.

Perhaps that change will never come. Still, even if complete disarmament proves impossible, we might negotiate a less ambitious mutual arms reduction treaty. We might at least agree to stop pretending that constitutional text unambiguously and finally resolves the disputes between us. We might come to see that our fellow citizens who disagree with us about issues like gun control, abortion, affirmative action, and the appropriate reach of government power are disavowing core tenets of our political community.

¹² See XII THE WRITINGS OF THOMAS JEFFERSON 418-20 (1892-97 PAUL LEICESTER FORD, ED.) (Jefferson defending constitutional violations during his administration); Special Session Message (July 4, 1861), in 7 Compilation of the Messages and Papers of the Presidents 3225 (James D. Richardson ed. 1897) (Lincoln defending making additions to military without congressional approval “whether strictly legal or not.”)

¹³ See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

I am not certain, but I think that Professor Waldron agrees with me that if we could accomplish even that much, our polity would be better off for it.