**Justice and Constructivism**

**Preliminaries**

Albert Weale’s *Democratic Justice & the Social Contract* is an important book for at least two reasons. First, it offers an innovative and original (proceduralist) account of justice. Second, and connectedly, it places what Brian Barry called ‘the empirical method’ (Barry 1989, pp. 347-8) at the centre of normative political philosophy’s attempts to generate determinate answers to moral questions (it is no accident that Barry introduces the distinction between the *a priori* and empirical methods in a sub-section entitled ‘Getting Answers’ (Barry 1989, p. 345).) In these comments I shall not attempt to summarise the argument or even to take up all of the most substantive elements of Weale’s book (which includes, *inter alia*, a wonderful discussion of the concept of deliberation). Rather, my comments are focussed in general on the kind of argument it is that Weale is offering and in particular on the nature of his constructivist project. I do so from the perspective of someone sympathetic to both the commitment to mutual advantage and to the empirical method.

**Justice**

Weale’s commitment to the proceduralist nature of contract theory is clear from the start. He writes ‘one of the intellectual attractions of contract theory is that it is proceduralist.’ What this means is that ‘it renders questions about the content of justice—questions about whether particular rules or practices are just—into questions about decision procedures, asking under what conditions individuals would have reason to make certain types of agreement’ (Weale 2013, p. 6; future page references are to this volume). The ‘attractions’ of this, for Weale, are twofold: first, it ‘provides an obvious link to democratic practice’ (p. 7). Second, and connectedly, proceduralism has the potential to end the otherwise seemingly endless disputes about the content of justice. People, as we know, disagree about what justice requires and first-order debates tend to descend into the ‘pitting competing intuitions against one another’ (p. 6). Ideally, proceduralism allows people to agree on an account of the decision procedure and then to ‘read off’ the content of justice (p. 7).

We might legitimately ask, though, two things: what is the scope of justice (does it cover whatever emerges from the decision procedure) and, more importantly, why we should think that the procedural level will not be bedevilled by exactly the same endless disputation as occurs at the level of substantive first-order discussions of justice. My main focus will be on the second of these questions, but consider for a moment the first.

The scope of justice cannot be (can it?) that any and all decisions made by the procedure are matters of justice merely by virtue of having this pedigree. At various points in Weale’s book many things are mentioned—(taxes, jury duty, environmental protection) and an ambitious list of issues for social contract theory is given on page 30—but there does not seem to be the sort of restriction that is in Rawls’s ‘basic structure’ constraint (Rawls 1971, pp. 7-11). Instead, what appears most often in the book is reference to a just society or a just democratic society, but there is no definition of justice as a virtue or of its scope. Perhaps this is indicative of the fact that the empirical method points to social contracts as ‘local’ events in which different communities facing different circumstances agree on different principles, but even then the worry remains that justice is not the *only* virtue in political life; even if we agree that it is ‘the first virtue’ (Rawls 1971, p. 3).

The second issue—which concerns whether first-order disputes about justice will simply be displaced to the procedural level—has been associated with contract theory in one form or another at least since Hume’s famous critique (Hume 1994). Although we perhaps have reason to hope that, as Weale puts it, ‘we have a better understanding of decision procedures than we do of the content of justice’ (p. 6), the problem lies less with the decision procedures—although, of course, as Rawls’s use of maximin shows, those too can be controversial—than with the construction of the ‘original position’ or ‘state of nature’ out of which decisions are to be made. Thus, Rawls’s original position is explicitly constructed so that the persons within it will choose Rawls’s two principles of justice and a differently constructed choosing situation would generate different principles.

Weale, of course, is aware of this problem and it is in part what motivates him not to construct (yet another) hypothetical choosing situation, but rather to deploy the empirical method: ‘in place of thought-experiments in which the theorist specifies the key features of the [contracting] agents together with the conduct and outcomes of their negotiation’, he writes, ‘the theory [relies] on examining a subset of political associations’ (p. 14). This subset is made up of ‘common property resource regimes’ the analysis of which is critical to the overall argument. But, why this subset? The answer to that question is that they embody ‘circumstances that make it plausible to hold that the upshot of the [contract] is one of justice’ (p. 14; the conditions that make this so are laid out on pp. 40-47). To understand the significance of this for the nature of Weale’s proceduralism, we need a further distinction—one Weale himself deploys—between *faux* and genuine constructivists.

***Faux* and genuine constructivists**

The worry that first-order disputes about justice will be displaced to the procedural level has a deeper form than merely the concern that different theorists will characterise the agents and their negotiations in different ways depending on their non-procedural convictions about the content of justice, which is to do with what work the construction itself is doing in the argument. For some constructivists, the construct teases out, models, or ‘makes vivid’ (Rawls 1971, p. 18) certain fundamental moral commitments (for example, freedom and equality). For others, the construction itself must be made of non-moral building blocks out of which the requirements of justice are to be generated. Elsewhere I have argued that since the former group assume precisely the claims of freedom and equality that the construction is meant to vindicate, they are ‘*faux* constructivists’.[[1]](#endnote-1) Weale adopts this distinction and, importantly, identifies his account as an ‘authentic constructivism’ as against a ‘*faux* constructivism’. This is as one would expect given Weale’s commitment to ‘proceduralism’; after all, the content of justice is meant to be given (not assumed) by the procedure.

However, things are not straightforward. Although the account is procedural and, indeed, proceeds by examining certain empirical cases, Weale is clear that we can distinguish between just and unjust social contracts (e.g., pp. 22-23) and moreover offers a criterion for a just contract. ‘What would make for a just social contract?’, he asks, and replies, ‘in answer to this question, we need to introduce Mill’s idea that it is in a union of persons of not very unequal strength that the dominion of one over another can be avoided. The idea of a just social contract is one in which the common rules that protect the public interests of a society reflect the approximate equality of power of its members’ (p. 23, footnote omitted). It is the spelling out of what Mill’s idea means that then leads him to identify ‘common property resource regimes’ as the relevant subset amongst empirical examples of social contracts.

It is clear, then, that whilst the content of justice is given by the procedure, the procedure itself can also be judged to be just or not just and in large part the justice of the procedure lies in the rough ‘equality of power’ of the members. This idea is further fleshed out, and given more moral punch, later in the book when Weale requires of ‘a mutual advantage conception’ of justice (which he endorses) that it ‘does not say that justice involves being treated by the principles that the more powerful can impose on the less powerful. It is the requirement that the more powerful behave to the less powerful *as though they were equally powerful*’ (p. 215, emphasis added; similar claims are made on p. 230).

But, if the account assumes rough equality, is it not then a form of *faux* rather than an authentic constructivism? On the one hand, it would seem so for clearly equality itself is assumed in, rather than generated by, the construction. On the other, Weale’s response (about which I will not say very much given that his reply to these comments is included in this symposium), is to distinguish between what we are trying to understand—in this case, the *moral* notion of justice—and the (genuine) constructivism that we use to aid that understanding. Within the latter, rough equality is a non-moral notion albeit one that is adopted in order to make this a theory of justice rather than a theory of something else.

As a genuine—rather than a *faux*—constructivist, I am nevertheless deeply suspicious of the sudden appearance of a (pre-constructivist) commitment to the equality of the parties to the bargain. One of the downsides of being a genuine constructivist whose account is grounded in mutual advantage is that one has to bite the bullet on occasion when it comes to (as Gauthier famously put it) ‘animals, the unborn, the congenitally handicapped and defective’ all of whom may well ‘fall beyond the pale of a morality tied to mutuality’ (Gauthier 1986, p. 268).[[2]](#endnote-2) Weale’s egalitarian assumption of roughly equal power allows him to avoid this outcome. In what follows, I want first to look at the account of equal power before, second, offering some arguments derived from Weale’s book that he might have used (but did not) to underwrite rough equality within the constructivist account (rather than as an assumption of it).

**Equality of Power**

In §4.3 (pp. 111-18), Weale explicitly addresses ‘Equality of Power’. In common property resource regimes, each participant is said to be equal in the following respects:

(a) each has their own good to advance (‘in particular the benefit that each derives from the resources that they are able to harvest’);

(b) each has an ‘interest in securing sufficient resources to survive and flourish’;

(c) and each ‘has a [common] interest in the long-term maintenance of the common pool resource’ (p. 111).

One might perhaps think of (a)-(c) more perspicuously as ‘circumstances’, rather than indicators, of equality, but whatever might be the best understanding of them, together they mean that ‘participants are interested in their own good [(a) and (b)], but they also have an interest in being able to bargain to mutual advantage with one another over the good that they share in common’ (p. 111). The critical passage then follows: ‘to say that there is an equality of bargaining advantage is to say that the influence that each can play in those negotiations is approximately equal, or at least that no subset of actors so dominates the negotiation that they can achieve their own goals without compromise’ (p. 111).

The rest of the section offers a sophisticated account of how we ought to conceptualise this equality in terms of power and it ends with an interesting account of how, given equal power, participants have reason to offer and receive ‘firm and credible’ commitments to co-operation. The argument is thus an account of the nature and kind of equality that is found in common property resource regimes. But, by itself, this gives us no reason to think that such equality is a *value* or that such equality is a reason to look to common property resource regimes as our model rather than to other (‘unjust’) contracts.

In short, Weale’s account of equality of power explains something about common property resource regimes, but it cannot by itself justify the choice of such regimes as empirical case studies for an entirely genuine constructivism. Rather, the reason Weale is taking these regimes as his model is explained by a prior commitment to equality as intrinsic to justice. In what remains of my remarks, I want to consider some arguments that can be found in *Democratic Justice & the Social Contract* that—had they been developed in ways other than the ways Weale did develop them—might perhaps underwrite equality in some way other than as an assumption of the argument. In so doing I build on a number of claims that Weale makes (some of them more or less in passing), and I fully recognise that my account of how they might contribute to a genuine constructivist account goes beyond anything that Weale himself intends.

**Constructivist Routes to Equality**

For the genuine constructivist, the ideal would be to justify fully the choice of common property resource regimes, which crucially embody rough equality of power, without appealing to their appropriateness because of a normative, pre-constructive commitment to the value of equality (or, for that matter, to any other moral value). For complicated reasons—developed at length elsewhere—I am sceptical that this can be done, but I think it important that reasons can be given in favour of equality as a feature of constructivism (and not an assumption) even if, as I think, those reasons are not in the end decisive (2000, pp. 178-268). In a number of places in Weale’s book he offers arguments to explain the appropriateness of his choice of common property resource regimes that do not appeal to the value of equality itself. Below, I examine each of these.

*Equality and Legitimacy*

What we are trying to justify, then, is the claim that the construction—the social contract—should be one in which the contracting parties have rough equality of power. One possible answer touched upon by Weale is to tie such equality to democracy (or at least to political legitimacy). That is, if the contract to mutual advantage reflects unequal bargaining power—and so transmits these inequalities into radically inegalitarian outcomes—then the resulting political system will lack political legitimacy.

As Weale writes, there is no inconsistency here as ‘the conditions of political legitimacy are logically distinct from those of social justice’ (p. 32), but the argument is unlikely to satisfy the genuine constructivist. One can of course admit that political legitimacy is not justice, but then an account is needed of legitimacy and—to remain in the genuine constructivist camp—any such account ought not to be one that presumes the value of equality. Why would a regime that reflected unequal bargaining power, but that was nevertheless one of mutual advantage, lack legitimacy? After all, each party has done as well as possible given their unequal starting points.

One possible response is to connect political legitimacy to stability. Contracts that reflect very unequal bargaining power can be unstable as they breed resentment in those who do badly and who thus look out for opportunities to renegotiate, or renege on the agreement, should they be in a position to do so.[[3]](#endnote-3) However, this is an empirical matter in that where inequalities are very great stability might be achieved simply because those who are worse off never acquire the capacity to disrupt the contract. Thus, merely appealing to stability will not do the work needed to link the concepts of political legitimacy and equality. However, as we shall see, the appeal to stability might work in a different way.

*Stability and Risk Aversion*

Rather than presume a commitment to equality or link equality with political legitimacy, we might instead think of roughly equal power as a (risk averse) aspect of the rationality of the parties to the agreement. Why should we do so? In part for the reasons just discussed. Insofar as the parties have an interest in the long term stability of the agreement it may be that each has a reason to abstract from what she can extract from her bargaining position at the moment of contracting. Moreover, this concern for stability may be reinforced by the awareness that bargaining positions might shift rendering the once powerful at the mercy of the once weak. Such an awareness, writes Weale, might lead the parties to understand that ‘mutual restraint is to common advantage’ (p. 230). This is not quite, as Weale recognises, to think of one’s place as—as Rawls once put it—‘assigned [by one’s] enemy’ (Rawls 1958 (1999)). Rather, the ‘argument is to be understood as the view that, however my place is determined, it makes sense to favour designs that will protect me from the abuse of power by others and I shall assess the extent of that possible abuse by reference to a situation in which power was balanced or roughly equal among affected parties’ (pp. 231-32).

Of course, working out such an argument would require a great deal of detail, and an account of the rationality of the parties particularly with respect to long term commitments; something akin to Gauthier’s ‘constrained maximization’ (Gauthier 1986). Moreover, whilst there are clearly cases where one has reason not to exploit one’s bargaining power—and to be conscious of one’s potential weakness should the fates change (or indeed should one grow older as one inevitably will)—there are also cases where that is not so.[[4]](#endnote-4) Nevertheless, the argument from stability and risk-aversion could play a potentially significant role in explaining the choice of common property resource regimes as the model of democratic justice without any prior appeal to equality.

*Empirical Equality in Great Societies*

A final argument in favour of equality as part of the constructivist account—and so in favour of common property resource regimes as the appropriate model of democratic justice—is that rough equality of power is a feature of modern human societies, and in particular of the ‘great societies’ that Weale discusses. Weale himself denies this. He writes of the ‘serious methodological challenge’ to his theory of ‘the rarity of societies that meet the equal power condition’ (p. 224), but it is possible to find two arguments in the book that nevertheless support the use of rough equality of power.

First, Weale offers an evolutionary account of how social conditions move towards egalitarianism and that once they have done so they ‘become stable’ because of the ‘incentives to maintain and uphold the rules and practices’ that emerge (p. 226). The argument here resembles Rawls’s account of how *modus vivendi* agreements can evolve over time into ‘stability for the right reasons’ (Rawls 2005).[[5]](#endnote-5)

Second, we should recognise that once we have a sophisticated enough understanding of the myriad ways in which the social practices of great societies are enhanced, maintained, and undermined, we will be able to see the contribution (or threat) that all (or very nearly all) participants can make and thus will be able to see why it is that they are participants with whom to engage in a contract to mutual advantage on roughly equal terms (see pp. 115-6).

A version of this argument underpins Hobbes’ account of equality of power in which, after all, he does not think each individual equal in power, but rather that each individual is equally vulnerable to the (sometimes combined) threats of others and it is one that (I think) is not taken seriously enough. The understanding of bargaining power in contemporary political philosophy seems sometimes as if it has not advanced from the relative abilities of people in isolation in the state of nature to harvest apples from trees or to grow crops (a tendency mutual advantage theorists have sometimes encouraged). Yet, of course, such examples are of no relevance whatsoever to the situation in which we find ourselves. Contemporary societies are complicated in ways that make us interdependent.

This argument is strengthened if one thinks—as Hobbes did—in terms of vulnerability or potential disadvantage rather than in terms only of contracts to advantage. Thus, some time ago (before 2001) Brian Barry and I co-authored a piece on international justice (ref removed). We concluded a (broadly egalitarian) piece by arguing that if rich developed nations could not be brought to see their moral obligations to the poor by moral arguments, then the development of suitcase nuclear weapons and other transportable weapons might alert them to the fact that the poor had threat advantage and thus that rich nations had (mutual advantage) reasons to engage with global inequality and poverty (in Weale’s terms (pp. 115-6), we are all ‘interdependent’). Of course, such an argument will not satisfy egalitarians—if it delivers equality, they will think it does so for the wrong reasons—but that of course is not the point. It will be enough for the genuine constructivist if, in conjunction with the other arguments presented above, it can show that (as quoted above) ‘no subset of actors so dominates the negotiation that they can achieve their own goals without compromise’ (p. 111).

**Conclusion**

In the acknowledgements to *Democratic Justice & the Social Contract,* Weale writes that ‘if I am now a genuine constructivist, it is due to [].’ In this piece I have tried to identify why I think the antecedent is not quite satisfied. Weale is not, in my terms, a *faux* constructivist in that he explicitly and purposely avoids invoking moral values within the constructivist social contract. Yet, in identifying just and unjust contracts and in choosing common property resource regimes as the model for the former, he assumes a connection between equality and justice in a way that is not (in my view) available to the genuine constructivist. In my remarks I have tried to identify moments in the book where Weale (perhaps giving voice to his inner genuine constructivist) provides arguments that might when fully worked out be enough to underwrite the appeal to equality within the theory. In doing so, I am not arguing that this is what Weale intends or that the arguments that I have identified are enough as stated, but rather that they might be enough when fully worked out to provide reasons to favour rough equality of bargaining power without assuming the moral value of equality.

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1. Author omitted. A similar distinction is made by both Kymlicka and Gauthier who both adopt what has become the more standard nomenclature of ‘contractualist’ (for faux constructivists) and ‘contractarian’ (for genuine constructivists). See (Kymlicka 2002, , pp. Xxx-xxx); (Gauthier 1997) [↑](#endnote-ref-1)
2. Although, as I have argued elsewhere, there are arguments that allow mutual advantage theorists to be more inclusive (2000, pp. 223-29). [↑](#endnote-ref-2)
3. The discussion here overlaps with the complicated account of the contract between ‘masters’ and ‘slaves’ in Gauthier (1986, pp. 190-95) discussed in (2000, pp. 159-61) [↑](#endnote-ref-3)
4. Weale’s own account of the practical rationality of the parties does not mention this argument. In that account, he gives an explanation of the ways in which norms come to be internalised, but it is clear that what is being internalised is the outcome of democratic justice (with its egalitarian assumption) (see pp. 101-11). [↑](#endnote-ref-4)
5. Weale himself offers this as a prescriptive account: given a commitment to equality, ‘constructive action must take advantage of any windows of opportunity that open from time to time’ (p. 225). The genuine constructivist of course cannot follow Weale here, but instead must reinterpret the argument. [↑](#endnote-ref-5)