16

Judicial Representation: Speaking for Others from the Bench

Wendy Salkin[1]

Being represented has value.[2] When another speaks for me, they can give voice to my perspective or interests in fora where my perspective or interests might otherwise go unheard or even unspoken. They may give voice to interests which I do not know how to express or which I do not even know I have. Our traditional understanding of political representation is that it is an activity that takes place only or mostly in discrete and easily recognizable legislative fora – for instance, the Senate or the House of Representatives. But, if we instead think of political representation as a practice of speaking or acting for others that could, in theory, arise anywhere a person's or a group's interests arise, then it turns out that political representation may take place anywhere there is a speaker or an actor and an audience.

Because we have long clung to our traditional notions of political representation, many types of political representation, though ubiquitous and consequential, remain woefully undertheorized. This essay sets out the beginnings of a theory for one such phenomenon: judicial representation. Judicial representation occurs when, by virtue of what a judge says from the bench (for instance, in an opinion or during oral argument), they come to speak or act on behalf of the members of a group whose interests are at stake in a case. The account offered here will not be fully general.[3] It

[1] For insights and comments on many of the ideas that appear in this article, I am grateful to Eric Beerbohm, Nicholas D. Conway, Dick Moran, Govind Persad, Tim Scanlon, Tommie Shelby, and Pars Tarighy. For feedback on drafts of this Chapter, I thank the editors of this volume, as well as participants and audiences at the 2018 Beyond Disadvantage: Disability, Law, and Bioethics Conference at Harvard Law School and the 2019 Meeting of the Philosophy, Politics, and Economics Society. I dedicate this Chapter to the memory of Anita Silvers, a colleague, mentor, and friend who offered encouragement, feedback, and guidance on this Chapter and much else besides. Ideas and arguments advanced in this Chapter are discussed in greater detail in both my doctoral dissertation, Informal Political Representation: Normative and Conceptual Foundations, infra note 2, and a monograph on which I am currently at work, Not Just Speaking for Ourselves, infra note 2.

[2] See Wendy Salkin, Informal Political Representation: Normative and Conceptual Foundations (2018) (Ph.D. dissertation, Harvard University) (on file with author) (hereinafter Informal Political Representation); Wendy Salkin, Not Just Speaking for Ourselves (2019) (unpublished manuscript, on file with author).

[3] For a general account of judicial representation, see Salkin, Not Just Speaking for Ourselves, *supra* note 2; for discussion of judges serving in representative roles, see also Phillip Pettit, Varieties of Public

will concern the judicial representation of groups, rather than individuals, though individuals can also be judicially represented. It will concern the judicial representation of a vulnerable group and, moreover, a group of which no group member will themself be a judge – the severely intellectually disabled. And it will take as its focus just one opinion in just one case – Justice Marshall's partial dissent in *Cleburne* v. *Cleburne Living Center*.[4]

The judicial representative does not merely speak about the members of the group at issue, but comes to speak for the members of the group in that group's stead.[5] Judicial representation may, in fact, turn out to be part and parcel of what it is to be a judge.[6] This essay takes no stand on whether that is so, but simply introduces the concept and attempts to understand its contours in a case where the represented group's members are, in some sense, unable to speak for themselves.[7]

The severely intellectually disabled are not appointed or elected as judges. And so, if their circumstances, values, interests, preferences, desires, or perspectives are to be given voice *by a court*,[8] such expression will need to be given by people who are not themselves members of the group. That is, any judicial representative of the severely intellectually disabled will not themself be severely intellectually disabled. And so, as will be discussed in detail in Section III, one concern that arises in the case of interest here (the judicial representation of the severely intellectually disabled), but which also arises in many other cases of political representation, is this: is it possible for a group to be represented well by a person who is not themself a member of the represented group?[9]

This essay proceeds as follows: Section I provides background on *Cleburne*. Section II acquaints the reader with Justice Marshall's partial dissent. Section III

Representation, in Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood, and Alexander S. Kirshner, eds., POLITICAL REPRESENTATION (New York: Cambridge University Press) 61–89 (2010).

4 473 U.S. 432 (1985). Justice Marshall concurred in part and dissented in part.

5 The distinction between speaking for and speaking about is discussed in greater detail below.

6 For discussion as to whether being a judicial representative is an essential feature of being a judge, see Salkin, Not Just Speaking for Ourselves, *supra* note 2.

7 In this essay, I make no claim as to whether, given proper support, the severely intellectually disabled can speak for themselves *simpliciter*. Rather, the view developed here relies on the observation that there neither are nor are their likely to be judges who are severely intellectually disabled. As such, anyone who serves as a judicial representative for the severely intellectually disabled will not be a member of the group. The aim of this essay, then, is to explore the following question: Given that no member of the group *the severely intellectually disabled* is a judge, what principles ought to guide the representative activities of a nonmember who is on the bench and who is well-situated to give voice to the circumstances, values, interests, preferences, desires, or perspectives of members of that group on its members' behalves? This question is not, of course, only applicable to the severely intellectually disabled, but could be raised for any group for which it is true that no member is a judge. See *id*.

8 Note that this is narrower than the question whether a severely intellectually disabled person might be represented in court at all – by a lawyer, by amici, or by themself (as a witness or plaintiff, say).

9 For a more complete treatment of this question, see Wendy Salkin, The Limits of Similitude and Deference: Reexamining Core Principles of Political Representation (2018) (hereinafter The Limits of Similitude and Deference) (unpublished manuscript, on file with author).

explains judicial representation and considers what a judge must know about the represented in order to be a good judicial representative.[10] Section IV concludes.

I. *CLEBURNE* V. *CLEBURNE LIVING CENTER*

It was July of 1980 when "Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas."[11] Hannah intended to lease that building to Cleburne Living Center, Inc. (CLC) so that CLC could operate a group home there for the severely intellectually disabled.[12] The home would house thirteen men and women who would be "under the constant supervision of CLC staff members."[13]

The site of 201 Featherston Street is in an area of Cleburne, Texas that was, at least at the time, zoned as an "Apartment House District" or "R-3 district."[14] According to Section 16 of Cleburne's zoning ordinance, R-3 sites could be used as sites for hospitals, sanitariums, or nursing homes for "the insane or feeble-minded or alcoholics or drug addicts"[15] only if one obtained a special use permit.

The City viewed the proposed group home at 201 Featherston as a "'hospital for the feebleminded,'"[16] and, accordingly, required CLC to apply for a special use permit before it could operate the home. Among the concerns that motivated the City Council to "insist"[17] that CLC seek a special use permit were "the negative attitude of the majority of property owners located within 200 feet of the Featherston facility" and "the fears of elderly residents of the neighborhood."[18] CLC applied for the permit.

After holding a public hearing, the City Council voted three to one to deny CLC the permit.[19] The City Council expressed concerns that (i) the students from the junior high school across the street from the site might harass the would-be occupants of the Featherston home, and, in a decidedly more diluvial vein, (ii) the proposed location of the Featherston home was "on 'a five-hundred-year flood plain.'"[20]

[10] There are further questions to be asked about what must be the case for a judge to be a good judicial representative. See Salkin, Not Just Speaking for Ourselves, *supra* note 2.
[11] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).
[12] The Court called this group "the mentally retarded." I shall not follow the Court in this.
[13] Cleburne, 473 U.S. at 435.
[14] *Id.* at 437 n.3.
[15] Cleburne, 473 U.S. at 437 n.3 (italics omitted).
[16] *Id.* at 436–437.
[17] *Id.* at 447.
[18] *Id.* at 448.
[19] *Id.* at 437.
[20] *Id.* at 449. As the Court points out, it is not clear why "the possibility of a flood" would serve as a sound basis for a distinction between the Featherston home and, "for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit." *Id.*

Perhaps you already know this much. After all, *Cleburne* is a curious case, and well-known for being so. It is one of few cases in which the Supreme Court of the United States held a statute or ordinance unconstitutional after having subjected the statute or ordinance to the otherwise very permissive standard of rational basis review.[21] And the zoning ordinance at issue was subject to rational basis review, rather than any form of heightened scrutiny, because the majority "refus[ed] to recognize the retarded as a quasi-suspect class."[22] Ultimately, the Court held that requiring a special use permit for the Featherston home denied respondents the constitutionally enumerated equal protection of the laws,[23] as there was not "any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests"[24] – rather, the Court concluded, "requiring the permit in this case appears . . . to rest on an irrational prejudice against the mentally retarded."[25]

Cleburne is also a window onto our target, that overlooked and undertheorized judicial role: the role of the judge as representative, who speaks from the bench as the spokesperson for a group whose interests are at stake in the case before the court. This phenomenon is an instance of a more general phenomenon, *informal representation*.[26] Informal representation can play a crucial role in giving voice to the circumstances, values, interests, preferences, desires, or perspectives of members of marginalized, oppressed, or otherwise vulnerable groups in a society. But, it also gives rise to a number of special concerns when the representative sits on the bench, as will become clear in what follows.

II. JUSTICE MARSHALL'S PARTIAL DISSENT AS JUDICIAL REPRESENTATION

Although he dissented in part, Justice Marshall did agree with some of the majority's judgment. He agreed, for instance, "that all retarded individuals cannot be grouped together as the 'feebleminded' and deemed presumptively unfit to live in a community."[27] So, too, did he agree with the majority's reliance on a background principle that "mental retardation *per se* cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. . . . The Equal Protection Clause requires attention to the capacities and needs of retarded people as individuals."[28]

[21] See also Romer v. Evans, 517 U.S. 620 (1996); United States v. Windsor, 570 U.S. 744 (2013).
[22] Cleburne, 473 U.S. at 446.
[23] U.S. Const. amend. XIV ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.")
[24] Cleburne, 473 U.S. at 448.
[25] *Id.* at 450.
[26] See, for example, Salkin, Informal Political Representation, *supra* note 2; Salkin, Not Just Speaking for ourselves, *supra* note 2.
[27] Cleburne, 473 U.S. at 455.
[28] *Id.* at 455–56.

He denied, however, that the majority in fact relied on "ordinary rational-basis review" in its opinion:[29] "Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."[30] Contra the majority, he urged that "it is important to articulate . . . the facts and principles that justify subjecting [Cleburne's] zoning ordinance to the searching review – the heightened scrutiny – that actually leads to its invalidation."[31]

In reasoning towards these conclusions, Justice Marshall emerges as a judicial representative of the severely intellectually disabled. That is, he speaks for the severely intellectually disabled as their representative in their stead through his articulation of their circumstances, values, interests, preferences, desires, or perspectives. It is worth at this point making explicit a conceptual distinction between speaking for and speaking about.[32] Speaking for concerns the source of a statement or action – that is, who said something, either actually (the representative, say) or constructively (the represented, say), rather than the content of what was said. What unites instances of speaking for is at least that, in each case, what the speaker says is ascribed to another as though that other said it themself. Speaking about, by contrast, concerns the content of what is said, rather than its source. While there is a conceptual distinction between speaking for and speaking about, this does not mean that the two practices are mutually exclusive. A given instance of speaking can be, simultaneously, both an instance of speaking for and an instance of speaking about.[33] By giving voice to the circumstances of the severely intellectually disabled, Justice Marshall not only speaks about the severely intellectually disabled, but also speaks for them as their representative.[34]

Consider, for instance, his response to the majority's suggestion that discrimination against the intellectually disabled is somehow, in 1985, a relic of a bygone era:[35]

> For the retarded . . . much has changed in recent years, but much remains the same; out-dated statutes are still on the books, and irrational fears or ignorance, traceable

[29] *Id.* at 456.

[30] *Id.*

[31] *Id.*

[32] See Salkin, Informal Political Representation, *supra* note 2 at 12–13; Wendy Salkin, Speaking For, Speaking About, Speaking With, Speaking Out (2017) (unpublished manuscript, on file with author); see also Linda Alcoff, *The Problem of Speaking for Others*, 20 Cultural Critique, 5–32, 9 (Winter 1991–1992); Michael Saward, THE REPRESENTATIVE CLAIM (New York: Oxford University Press), chap. 2, locs. 655–656 of 2569, Kindle.

[33] One can, at the same time, both speak about and speak for. See Alcoff, *supra* note 32.

[34] In saying that Justice Marshall emerges as a judicial representative of the severely intellectually disabled through his partially dissenting opinion in *Cleburne*, I do not mean to suggest that Justice Marshall does so with the authorization of the severely intellectually disabled. Rather, one may emerge as an informal representative without having been authorized by those for whom one speaks or acts. See Wendy Salkin, The Conscription of Political Representatives (2019) (unpublished manuscript, on file with author); Salkin, Not Just Speaking for Ourselves, *supra* note 2.

[35] According to the majority, "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." Cleburne, 473 U.S. at 443 (internal citations omitted).

> to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people.[36]

Justice Marshall goes on to insist that the Court should recognize both "the history of discrimination against the retarded and its continuing legacy," and suggests that this discrimination provides evidence that "the mentally retarded have been, and in some areas may still be, the targets of action the Equal Protection Clause condemns."[37]

In addition to bringing attention to the enduring discrimination faced by the severely intellectually disabled, Justice Marshall also gives voice to the weightiness of the interest denied them when they are denied housing of the sort at issue:

> [T]he interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. For retarded adults, this right means living together in group homes . . . Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment – the ability to form bonds and take part in the life of a community.[38]

The above are incontestably instances of speaking about the circumstances of the severely intellectually disabled. But we ought also to consider whether Justice Marshall's acts of giving voice to the circumstances, values, interests, preferences, desires, or perspectives of the severely intellectually disabled in a context where they are unable to do so for themselves are instances of speaking for the severely intellectually disabled – thereby serving as their judicial representative.

Strictly speaking, whether Justice Marshall is a judicial representative for the severely intellectually disabled depends not merely on whether he speaks or writes about their circumstances, values, interests, preferences, or desires, or even from their perspectives, but also depends on audience uptake – that is, on being taken to speak or act on their behalf by some audience.[39] So, to know whether Justice Marshall in fact became an informal representative for the severely intellectually disabled on the basis of his partial dissent in *Cleburne* depends on whether he received audience uptake – that is, was he understood by one or more audiences to be speaking for the severely intellectually disabled in his partial dissent? For present

[36] *Id.* at 467.
[37] *Id.* at 473.
[38] *Id.* at 461 (internal citations omitted).
[39] Many are of the view that for a person to emerge as a representative of a group, it must be the case that the group or at least some of its members play a role in selecting that person to be the group's representative. With respect to informal representation, I deny that this is so. A party emerges as an informal representative of a group when and because they have been taken to speak or act on behalf of that group by some audience, despite not having been elected or selected to represent that group by means of a corporately organized election or selection procedure. Although it may be the case that the audience is the represented group itself, this need not be so and often is not the case. For more on the emergence conditions for becoming an informal representative, see Salkin, The Conscription of Political Representatives, *supra* note 34; Salkin, Not Just Speaking for Ourselves, *supra* note 2.

purposes, I assume that Justice Marshall received audience uptake and so became a judicial representative for the severely intellectually disabled.

Unlike legal representation, a relationship in which one party speaks on another party's behalf *to the court*, judicial representation is a practice that can only be undertaken *from the bench*. It is a relationship in which a party that is not a member of the judiciary is spoken for *by the court*. It follows that if one is a member of a group that does not have any group members on the bench, any judicial representation that will take place on one's behalf qua group member will be representation by a judge who is not a member of the group of which one is a part. The fact that members of some groups will only ever be judicially represented by people who are not themselves members of the groups for which they speak may quite reasonably raise concerns about the judicial representative's ability to represent the group's members well.

III. JUDICIAL REPRESENTATION AND JUDICIAL UNDERSTANDING

Since a judge's emergence as a judicial representative depends on audience uptake, it is possible that a judge may emerge as a judicial representative without having much understanding at all of the group they come to represent. However, for a judge to be a good judicial representative – where this means, among other things, that the judge is well-informed about the represented group's members' circumstances and able to communicate accurately on the represented group's behalf – the judicial representative will need to have some understanding of the members of the represented group and their circumstances. What, then, must a judge know in order to understand the members of the group and their circumstances?

This question, in fact, is better asked as two questions: First, from what source must the judicial representative come to have knowledge about the represented group? Second, what must the content of the judicial representative's knowledge be?

It is a commonly held view that one ought not be a representative for a group unless one is oneself a member of that group or shares characteristics in common with the members of the group that are relevant to the purpose of the representation. I call this *the demand for similitude*.[40] Often, this thesis is defended on epistemic grounds. So the view goes: to be a good representative for a group, one must know what it is like to be a member of that group. One can know what it is like to be a member of a group only if one is oneself a member of that group or shares

[40] Salkin, The Limits of Similitude and Deference, *supra* note 9; Salkin, Not Just Speaking for Ourselves, *supra* note 2. For other discussions of this principle and similar principles, see, for example, Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 Journal of Politics 628; Michael Walzer, *The Obligations of Oppressed Minorities*, in OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 51 (Harvard University Press, 1970); Melissa S. Williams, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (Princeton, NJ: Princeton University Press), chap. 4, sec. IV, locs. 2088–2092 of 5215 and chap. 5, sec. III, locs. 2563–2570 of 5215, Kindle (1998).

characteristics in common with the group's members. So, to be a good representative for a group, one must oneself be a member of that group or share characteristics in common with the group's members. Defenders of the demand for similitude tend to think that our own first-person experiences of our lives give us insights into our circumstances and the circumstances of others who are like us in relevant respects that other sources of information (for example, testimony or observation) simply could not. However, trenchant defenders of this view will have to commit themselves to the unsatisfying conclusion that, in certain representative contexts (for instance, judicial representation), some groups cannot receive good representation because the demand for similitude simply cannot be satisfied.[41]

It is quite reasonable to think that, often, our first-person experiences of our own lives give us insights into both our own circumstances and, in some cases, the circumstances of others who are like us in relevant respects. And perhaps it is the case that, with respect to certain insights, first-person experience is a *sine qua non* of achieving those particular insights. But it does not follow from the fact that some insights are best or only achieved through first-person experience that all insights can only be arrived at in that way.

Some groups will have no members on the bench. This means that there will be no members of the judiciary who have first-person experience of what it is like for members of those groups. For defenders of the demand for similitude, this means that such groups could have no good judicial representatives. That can be an unsatisfying result if one is persuaded that there is something independently valuable to judicial representation. If we think there is independent value to judicial representation and acknowledge that some groups will have no members on the bench, then we must allow that first-person experience cannot be a requirement of being a good judicial representative. When the judicial representative is not a member of the represented group (as Justice Marshall is not a severely intellectually disabled person), the source of the information will have to be third-personal: expert testimony, the record of the case, the attestations of the lawyers who provide formal legal representation to the members of the group, independent research, or another source.

Now, the second question: what precisely is it that the judicial representative must know about the represented group's circumstances to count as a good judicial representative? How demanding is the knowledge requirement? Though it is difficult to make a general statement as to how much or what sorts of information the judicial representative will need to know about the represented group in order to count as a good judicial representative for that group, the following relevance requirement can serve as a starting point: to be a good judicial representative for a represented group in a given case, the representative must have an understanding

[41] Elsewhere, I argue that we ought to reject the demand for similitude and instead endorse a more modest principle, the preference for similitude. See Salkin, The Limits of Similitude and Deference, *supra* note 9; Salkin, Not Just Speaking for Ourselves, *supra* note 2.

of the features of the represented group's members' circumstances that are relevant to the purpose of the representation in that case.

Return to the example of *Cleburne*. What must Justice Marshall know in order to be a good judicial representative of the severely intellectually disabled in a case that concerns housing discrimination against the severely intellectually disabled? He must know, for instance, what sorts of distinct forms of discrimination have been faced by the severely intellectually disabled, as *Cleburne* is a case concerning the application of the Equal Protection Clause. Justice Marshall evidences such knowledge when he discusses "the history of discrimination against the retarded and its continuing legacy."[42] So, too, must Justice Marshall have a sense of who falls within the ambit of the group *the severely intellectually disabled* – not knowing, of course, each numerically individual person who is so counted, but at least knowing that there is great variety among the persons so categorized and in virtue of what they may be so categorized. Justice Marshall gives evidence of his knowledge of the diversity among members of this group when, for instance, he agrees with the Court that "all retarded individuals cannot be grouped together as the 'feebleminded' and deemed presumptively unfit to live in a community" and acknowledges "variations in individual ability" among members of the group.[43] And, as *Cleburne* is a case concerning the housing needs of the severely intellectually disabled, the judicial representative of the severely intellectually disabled will need to know something about this, too. As discussed above, Justice Marshall shows understanding of these circumstances.[44]

Of course, what a judicial representative must know about those for whom they speak will be a highly context-dependent matter. What must be known depends on what is relevant to the instant case. That this is so should lead us to once more question the aptness of the demand for similitude.[45] If it turns out that the kind of representation that a given group requires could be carried out by anyone who was able to acquire the relevant knowledge and the relevant knowledge is of a type that can be acquired by means other than first-person experience, then it is not clear why one would want to limit the pool of potential representatives to only those parties that could have first-person experience of the circumstances of the represented group's members. Let me be clear: I do not deny that there may be other important values that are upheld by either preferring or insisting on representation by parties who are members of the represented group or who are at least group-adjacent.[46]

[42] Cleburne, 473 U.S. at 473.

[43] *Id.* at 455–56.

[44] *Supra* note 38.

[45] Recall the demand for similitude: One ought not be a representative for a group unless one is oneself a member of that group or shares characteristics in common with members of the group that are relevant to the purpose of the representation.

[46] By group-adjacent, I mean relevantly similar to the members of the group in identity, experience, or social position. See Salkin, Informal Political Representation, *supra* note 2; Salkin, Not Just Speaking for Ourselves, *supra* note 2.

What I am claiming here is rather more modest: First, if we are going to advance normative principles that limit the pool of potential representatives, we have to have good reasons for doing so. It is not obvious that there are good reasons for always limiting the pool of potential representatives to those who have first-person experience of the circumstances of the represented group's members. Second, in contexts where no group member could be a representative – as is the case for the severely intellectually disabled with respect to judicial representation – there are good reasons to favor judicial representation by people who are not members of the represented group.

IV. REPRESENTING THE POLITICALLY DISEMPOWERED

Cleburne v. *Cleburne Living Center* and, in particular, Justice Marshall's partial dissent in that case, serves as a lens on judicial representation – a practice in which a member of the judiciary speaks or acts on behalf of a group whose members are before that judiciary in a particular case. *Cleburne* brings out a perennial concern about representation: whether those who are not themselves members of a group may serve as good representatives for that group. If, contra the *Cleburne* majority, we find it plausible that the severely intellectually disabled are in fact "politically powerless"[47] or at least significantly disempowered by ongoing discrimination and stigma, then it is not hard to feel the force of the claim that a judicial representative may do good for the group by giving voice from the bench to group members' circumstances, values, interests, preferences, desires, or perspectives. But the good that judicial representation may do for the severely intellectually disabled or other politically disempowered groups must be weighed against serious, though not insurmountable, concerns as to whether a member of the judiciary could adequately represent a group of which they are not a member.

[47] Cleburne, 473 U.S. at 445.