

JUDICIAL REPRESENTATION: SPEAKING FOR OTHERS FROM THE BENCH

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I. Introduction

Judicial representation occurs when, by virtue of what a judge says from the bench, they come to speak or act on behalf of the members of a group whose interests are at stake in the case.

Target: To set out the beginnings of a theory of judicial representation.

- Concerned here with the judicial representation of groups, rather than individuals. Under consideration here, in particular, is the judicial representation of a group no member of which is a judge (the severely intellectually disabled).
- Focus: Justice Marshall's dissent in *Cleburne v. Cleburne Living Center*.

II. Background: *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)

In 1980, the City of Cleburne, Texas, required Cleburne Living Center, Inc. (CLC) to apply for a special use permit to use 201 Featherston Street in Cleburne as the site for a group home for the intellectually disabled. After a public hearing, the City Council ultimately voted three-to-one to deny CLC the permit.

The Court held that “requiring the permit in this case . . . rested on an irrational prejudice against the [intellectually disabled],” violating the Equal Protection Clause of the Fourteenth Amendment. This case is one of few in which the Supreme Court held a statute or ordinance unconstitutional after having subjected the statute or ordinance to rational basis review.

III. Justice Marshall's Dissent as Judicial Representation

Despite agreement with certain parts of the majority's opinion, Justice Marshall disagreed with, *inter alia*, the majority's reliance on rational basis review.

In his dissent, Justice Marshall emerges as a *judicial representative* of the severely intellectually disabled.

Emerging as a judicial representative requires receiving *audience uptake*. That is, whether Justice Marshall is a judicial representative depends on whether he was understood by at least one audience to be speaking for the intellectually disabled in his dissent.

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IV. Judicial Representation and Judicial Understanding

What must a judge know in order to count as adequately understanding the circumstances of the represented group's members to serve as a *good* judicial representative? Two questions:

- a. From what *source* must the judicial representative come to have knowledge about the represented group?

A popular view (call this *The Demand for Similitude*): One ought to be a representative for a group only if one is oneself a member of that group or shares characteristics in common with the group's members relevant to the purpose of the representation.

Epistemic argument in defense of *The Demand for Similitude*:

1. To be a good representative for a group, one must know what it is like to be a group member.
2. One can only know what it is like to be a group member if one is a group member or shares relevant characteristics in common with group members.
3. Therefore, to be a good representative for a group, one must be a group member or share relevant characteristics in common with the group members.

Challenge for defenders of *The Demand for Similitude*: In certain representative contexts (for instance, judicial representation), some groups can receive no representation because *The Demand for Similitude* cannot be satisfied.

Alternative: Reject *The Demand for Similitude*, accept weaker principle. Why? Judicial representation often has value for represented groups, even for groups no member of which is a judge and even for groups with whose members no judge shares relevant characteristics. Such groups could only have judicial representatives who neither are group members nor share relevant characteristics with group members.

- b. What must the *content* of the judicial representative's knowledge be?

Relevance requirement: To be a good judicial representative for a represented group, the representative must have an understanding of the features of the represented group's members circumstances that are relevant to the instant case.

V. Judicial Representation Versus Judicial Impartiality

Judicial representation is valuable, if it is, because it allows for the circumstances and perspectives of a represented group to be given voice by a court. Valuable how?

- Promotes recognition of the represented group and its members as belonging to the political community. Promotes recognition of the members of the represented group as persons whose interests matter and whose claims ought to be taken seriously.
- May communicate respect and regard to the members of the represented group.

But, a worry remains: May a judge both be a judicial representative (that is, speak for one or the other of the parties to a case) and satisfy the duty of judicial impartiality?