A Right-Based Critique of Constitutional Rights†

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1 *Introduction*

'Individuals have rights, and there are things no person or group may do to them (without violating their rights).'[1] 'Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.'[2] 'There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient.'[3]

These are familiar propositions of political philosophy. What do they imply about institutions? Should we embody our rights in legalistic formulae and proclaim them in a formal Bill of Rights? Or should we leave them to evolve informally in dialogue among citizens, representatives and officials? How are we to stop rights from being violated? Should we rely on a general spirit of watchfulness in the community, attempting to raise what Mill called 'a strong barrier of moral conviction' to protect our liberty?[4] Or should we also entrust some specific branch of government—the courts, for example—with the task of detecting violations and with the authority to overrule any other agency that commits them?

The advantages of this last approach continue to attract proponents of constitutional reform in the United Kingdom. Ronald Dworkin, for example,

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[1] Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), ix.
[2] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), 3.
[3] Ronald Dworkin, *Taking Rights Seriously*, New Impression (London: Duckworth, 1977), 193.
[4] John Stuart Mill, *On Liberty*, ch 1, para 15 (Indianapolis: Bobbs-Merrill, 1955), 18.

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has argued that it would forge a decisive link between rights and legality, giving the former much greater prominence in public life. By throwing the authority of the courts behind the idea of rights, the legal system would begin to play 'a different, more valuable role in society'. Lawyers and judges might take on roles more akin to those of their counterparts in the United States:

> The courts, charged with the responsibility of creating . . . a distinctly British scheme of human rights and liberty, might think more in terms of principle and less in terms of narrow precedent. . . . Different men and women might then be tempted to the law as a career, and from their ranks a more committed and idealistic generation of judges might emerge, encouraging a further cycle in the renaissance of liberty.[5]

If these judges used their new powers well, Dworkin concludes, governments would no longer be free, as they are now, to treat liberty as a commodity of convenience or 'to ignore rights that the nation has a solemn obligation to respect'.[6]

What should a political philosopher say about these proposals? In discussions of constitutional reform, I find it commonly assumed that the aims of Charter 88 and similar groups are shared by philosophers whose normative theories of politics are organized around the idea of rights. Surely, it is said, anyone who believes in rights will welcome a proposal to institutionalize a Bill of Rights and give the courts power to strike down legislation that encroaches on basic liberties.[7]

In this paper, I shall question that assumption. I want to develop four main lines of argument. The first is a negative case: I shall show that there is no necessary inference from a right-based position in political philosophy to a commitment to a Bill of Rights as a political institution along with an American-style practice of judicial review.

Secondly, I shall argue that political philosophers should be more aware than other proponents of constitutional reform of the difficulty, complexity, and controversy attending the idea of basic rights. I shall argue that they have reason—grounded in professional humility—to be more than usually hesitant about the enactment of any canonical list of rights, particularly if the aim is to put that canon beyond the scope of political debate and revision.

Thirdly, I shall argue that philosophers who talk about rights should pay much more attention than they do to the processes by which decisions are taken in a community under circumstances of disagreement. Theories of rights need to be complemented by theories of authority, whose function it is to determine how decisions are to be taken when the members of a community disagree about what decision is right. Since we are to assume a context of moral disagreement, a principle such as 'Let the right decision be made' cannot form part of an

[5] Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto and Windus, 1990), 23.

[6] Ibid, 12 and 21.

[7] For example, Bruce Ackerman in a recent article suggests that scholars who have a philosophical commitment to fundamental rights—'rights foundationalists', as he calls them—take it for granted that democracy is to be constrained by this commitment. See Bruce Ackerman, 'Constitutional Politics/Constitutional Law', (1989) 99 *Yale Law Journal* 465–71.

adequate principle of authority. It follows from this that, if people disagree about basic rights (and they do), an adequate theory of authority can neither include nor be qualified by a conception of rights as 'trumps' over majoritarian forms of decision-making.

Finally, I shall argue that, in a constitutional regime of the sort envisaged by proponents of Charter 88, the courts will inevitably become the main forum for the revision and adaptation of basic rights in the face of changing circumstances and social controversies. (This of course is an extrapolation from the experience of constitutional politics in the United States.) I shall argue that a theorist of rights should have grave misgivings about this prospect. Some of us think that people have a right to participate in the democratic governance of their community, and that this right is quite deeply connected to the values of autonomy and responsibility that are celebrated in our commitment to other basic liberties. We think moreover that the right to democracy is a right to participate on equal terms in social decisions on issues of high principle and that it is not to be confined to interstitial matters of social and economic policy. I shall argue that our respect for such democratic rights is called seriously into question when proposals are made to shift decisions about the conception and revision of basic rights from the legislature to the courtroom, from the people and their admittedly imperfect representative institutions to a handful of men and women, supposedly of wisdom, learning, virtue and high principle who, it is thought, alone can be trusted to take seriously the great issues that they raise?[8]

2 *Right-Based Theories*

My first aim is to show that there is no necessary inference from the premises of a right-based moral theory to the desirability of constitutional rights as a particular political arrangement.

What is meant by '*right-based*' theory? The terminology is adapted from Dworkin's discussion in *Taking Rights Seriously*, proposing 'a tentative initial classification of political theories' into right-based, duty-based and goal-based types.[9] The idea is that in any but the most intuitionistic theory, it is possible to distinguish between judgments that are more or less *basic*, in the sense that the less basic judgments are derivable from or supported by the more basic ones.[10]

[8] My conception of this as an issue of respect is inspired by Aristotle, who confronted the prospect of tyrannical or unjust action by a majority under a democratic constitution in the following terms. 'If the poor, for example, because they are more in number, divide among themselves the property of the rich—is not this unjust? No, by heaven (will be the reply), for the supreme authority justly willed it. But if this is not extreme injustice, what is? . . . Then ought the good to rule and have supreme power? But in that case everybody else, being excluded from power, will be dishonoured. For the offices of a state are posts of honour; and if one set of men always hold them, the rest must be deprived.' Aristotle, *The Politics*, Bk III, ch 10, 1281a29–32, translated by Benjamin Jowett, in the new Stephen Everson edition (Cambridge: Cambridge University Press, 1988), 15 (65–6).

[9] See Dworkin, *Taking Rights Seriously*, 90–6. For further discussion of this typology, see J. L. Mackie, 'Can There be a Right-Based Moral Theory?' in Jeremy Waldron (ed), *Theories of Rights* (Oxford: Oxford University Press, 1984).

[10] Joseph Raz stresses that the relation is one of support not logical entailment. If we think for different reasons that there should be (i) a right to free political speech, and (ii) a right to free commercial speech, we may sum that up by saying there should be (iii) a right to free speech generally. But although (iii) entails (i), it does not support it on this account of our reasoning. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 169.

Sometimes we may reach a level of 'basic-ness' below which it is impossible to go—a set of judgments which support other judgments in the theory but which are not themselves supported in a similar way. These will be the *fundamental* propositions of the theory or, as Dworkin has called them elsewhere, its '*constitutive*' positions.[11] Utilitarians pride themselves on the fact that their moral theory is organized explicitly in this way, and Dworkin's typology assumes that a structure of that kind can be discerned in many non-utilitarian theories as well.[12]

For the purposes of this article, nothing much hangs on the precise *distinction* between right-, duty- and goal-based theories. So I shall not go into the detail of Dworkin's classification.[13] What I want to work with is the idea that a concern for individual rights may lie in the foundations of a theory, leaving it an open question what those foundations entail at the level of political and constitutional construction.

Opinions differ as to whether the concerns at the basis of a theory of rights are exclusively concerns about freedom, exclusively concerns about independence, exclusively concerns about equality, or whether other material interests and needs may also be accorded basic importance in their own right. I hope to avoid that issue here as well (though it is one of the controversies whose significance I shall discuss later in the article).[14] Different theories will identify different individual rights—to freedom, independence, dignity, etc—as having fundamental and abiding importance, and they will regard a sense of that importance as a general basis for normativity within the theory.

As premises, these concerns are liable to be fairly abstract in character.[15] One would not expect to find propositions like the Fourth Amendment to the US Constitution in the *foundations* of a theory of rights. A right to the protection of one's home against unreasonable searches is likely to be based on the importance accorded to a deeper individual interest such as privacy. A right to privacy may in turn be based on even deeper premises about the importance of autonomy and self-governance. Derivative conclusions will then be generated by working out what, in the circumstances of modern society, is required if the deepest interests in this series are to be respected. That is what normative argument amounts to in right-based political philosophy.

[11] See Ronald Dworkin, 'Liberalism', in *A Matter of Principle*, 186 ff.

[12] Does this commit Dworkin or those who use his typology to 'foundationalism' in moral and political theory? The term has a wider and a narrower meaning. In its wider (and weaker) meaning, 'foundationalism' refers simply to the linear mode of organization that I have intimated: that there is some non-circular structure of support and justification within a theory, organized roughly on the model of an axiomatized theory in mathematics. The alternative to foundationalism in this sense is 'holism', where theorems are considered to be supported as much by what they imply as by what more general principles imply them. There is no doubt that a classification into right-based, duty-based, and goal-based types presupposes that the theories being classified are 'foundationalist' in this sense. When foundationalism is criticized, however, people often have in mind a stronger position than this. It is that the truth or assertibility of the 'basic propositions' or 'axioms' of such a theory can be immediately apprehended or intuited, and that the linear structure transmits this fundamental justifiability throughout the theory. The classification I have in mind in this article is not committed to this epistemology, and it does not presuppose any such commitment on the part of the theories being classified.

[13] For an unnecessarily protracted discussion, see Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 64–105.

[14] See section 5, below.

[15] See n 11, above.

Sometimes in the development of such an argument, we may reach intermediate conclusions which enable us to say that some relatively concrete interest must be regarded as important if some deeper interest is to be properly respected. This is where *familiar* propositions about rights will figure in a well-thought-out political theory. As we move from deep abstract premises to particular concrete recommendations, we may find ourselves saying things like 'People have a right to free speech' or 'Everyone has a right to elementary education' or 'Suspects in police custody have a right not to be tortured'. Though these propositions indicate important individual interests, their importance is explained by their deeper connection to other, more abstract interests whose importance is ultimate in the theory.[16]

However, right-based theories are not always articulated in a linear structure of this kind, moving from abstract rights through a series of derivative rights, each one supported by and more concrete than the last. Sometimes the implications of abstract premises are teased out in a different structure. John Rawls's discussion of justice is an example. It seems plausible to say, as Dworkin has argued, that Rawls's theory is premised on some very deep assumption 'that individuals have a right to equal concern and respect in the design and administration of the institutions that govern them'.[17] But in trying to see the concrete implications of that premise, Rawls develops his model-theoretic device of the 'original position' leading to the choice of two lexically ordered principles to govern the basic structure of a society. At least one of these (the 'Difference Principle') is not formulated in terms of rights at all.[18] Maybe the further process of inferring policy recommendations from the Difference Principle will involve some re-introduction of the language of rights.[19] But there is nothing inevitable about that: everything depends on how the deep concerns of the theory are best articulated in the concrete circumstances in which they are applied. The fact that there are rights in the foundations does not mean that there must be rights, so to speak, all the way up.

The point is a general one and can be applied to other types of theory as well. Utilitarianism has, in or near its foundations, a sense that the basic aim of morality is the maximization of utility. Whenever there is a choice of actions, it is better, from the theory's point of view, that that action be chosen which secures the greatest balance of utility, all things considered. But though we find this 'act-utilitarian' formula in the foundations of the theory, it does not follow that the theory's practical recommendation for men and women in the real world is to adopt an act-utilitarian decision-procedure. 'Indirect' utilitarianism suggests that the basic aim may be better served if individuals follow certain rules which

[16] See the excellent discussion in Raz, *Morality of Freedom*, 168–70.

[17] Dworkin, *Taking Rights Seriously*, 180.

[18] Indeed it is important for Rawls that the principle governing economic inequalities will *not* be seen as a principle of particular entitlement. See Rawls, *Theory of Justice*, 64 and 88.

[19] I have in mind the arguments intimated in Rawls, *Theory of Justice*, chapter V. See also Rex Martin, *Rawls and Rights* (Lawrence: University Press of Kansas, 1985) and Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989).

they treat more or less as absolute requirements in most of the circumstances they face.[20] Indeed, if a goal-based utilitarianism is articulated realistically, it may involve a commitment to rights at the surface even though rights do not figure at all in its deeper premises.[21] This example shows that we cannot infer much about the practical recommendations of a normative theory from the character of its fundamental premises.[22]

3 *From Moral Rights to Legal Rights*

So far we have considered only the relation between basic and derivative positions *within* a normative theory. The fact that, in a given theory, the basic premises (or even the intermediate theorems) are best formulated as rights does not show that the derivative recommendations of the theory are best formulated as rights. But suppose, for the sake of argument, that the normative recommendations of a right-based theory *are* formulated as rights. Can we say anything about the relation between those recommendations and the actions that they call for in the real world? If someone believes in *moral* rights, does that mean she is to be taken as demanding *legal* rights?

Jeremy Bentham, for one, thought the answer was 'Yes'. Or rather, he thought this was the best we could make of what was really an oxymoron—the idea of a moral, ie non-legal, right.[23] Maybe, he thought, we can reinterpret natural rights claims as normative claims about the legal rights that ought to be established: 'In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights.'[24] However, even Bentham's most sympathetic commentators have been bewildered by this insistence that the noun 'right' must necessarily refer (either descriptively or normatively) to *legal* rights. He did not take that view of 'duty', 'obligation', or 'right' (the adjective), each of which (he was prepared to say) had a normative meaning established by the principle of utility that was quite independent of the idea of positive law.[25]

One objection to Bentham's approach is that sometimes we talk of moral rights when we have no intention of saying anything about what the law ought to be.

[20] See R. M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Clarendon Press, 1981), chs 2–3 and 9.

[21] See the various discussions in R. G. Frey (ed), *Utility and Rights* (Oxford: Basil Blackwell, 1984). However, for doubts about the utilitarian defence of rights, see David Lyons, 'Utility and Rights', in Waldron (ed), *Theories of Rights*.

[22] In addition to 'indirect' utilitarianism, there are also the complications discussed by Don Regan in his book, *Utilitarianism and Co-operation* (Oxford: Clarendon Press, 1980). Regan suggests that the fundamental aims of a utilitarian theory are best met by adopting a decision-procedure that bears very little affinity to traditional formulas of act-utilitarianism.

[23] Jeremy Bentham, 'Supply without Burthern, *or* Escheat *vice* Taxation', in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987), 73: 'Right and law are correlative terms: as much so as son and father. Right is with me the child of law: from different operations of law result different sorts of rights. A natural right is a son that never had a father.'

[24] Jeremy Bentham, 'Anarchical Fallacies', in Waldron (ed), *Nonsense Upon Stilts*, 53. The passage continues: 'But reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established, is not that right—want is not supply—hunger is not bread.'

[25] There is an excellent discussion in H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 85 ff.

When my mother asks if I intend to remarry and adds 'I have a right to be told the truth', she is not saying anything about the law. She is saying I ought to tell her the truth and giving me some indication that I owe that duty *to her* in virtue of some interest she has at stake.

However, let us put those cases aside; suppose we accept H. L. A. Hart's suggestion that usually, when talk of rights is in the air, there is an implicit suggestion that the use of force (and thus the mechanisms of law) would not be inappropriate to secure what is required.[26] Even so, it does not follow that the normative claim

(1) P has a (moral) right to X

entails

(2) P (morally) ought to have a legal right to X.

If (1) entails anything about the law, it presumably entails

(3) The law ought to be such that P gets X.

There may be all sorts of ways in which X may be secured legally for P, without her having a legal *right* to it.[27]

Here, of course, a lot will depend on exactly how one defines 'legal right'. Maybe, on a very broad definition of the term, *any* legal procedure by which X is secured for P amounts to the existence of P's legal right to X. I do not want to rule out such a broad definition, except to indicate that it will not advance the argument of this article one way or the other. Most jurists, however, think that the phrase 'legal right' has quite a narrow meaning. To say that P has a legal right is to indicate the existence of an articulated legal rule or principle entitling P to X. It indicates that P has standing to claim X and to bring suit for it in a court of law. And for most jurists, it indicates that officials have very limited discretion in determining who gets X and who does not. We distinguish, in other words, between (a) legal situations in which X is P's by right and she may peremptorily demand it and the law is such that her demand must be met unless there are extraordinary circumstances, and (b) legal situations in which some official has been vested with discretion to determine on a case by case basis how best to distribute a limited stock of resources like X to applicants like P. Students of public administration argue back and forth about whether it is better to have systems of rights in welfare law, for example; and these arguments presuppose

[26] H. L. A. Hart, 'Are There Any Natural Rights?' in Waldron (ed), *Theories of Rights*, 79–80.

[27] A similar point is made by Henry Shue, in his book *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 16: '[A] right has not been fulfilled until arrangements are in fact in place for people to enjoy whatever it is to which they have the right. Usually, perhaps, the arrangements will take the form of law, making the rights legal ones as well as moral ones. But in other cases, well-entrenched customs, backed by taboos, may serve better than laws—certainly better than unenforced laws.'

that the existence of a legal right is a highly specific type of institutional arrangement along the lines of (a).

As far as I can see, nothing that institutionally specific is entailed by a claim like (1) above. I can imagine an advocate for the homeless saying, 'The homeless have a (moral) right to shelter', and certainly meaning that *something* legal should be done about it, but leaving it an open question whether that would be best achieved by a legal arrangement of type (a) or a legal arrangement of type (b). For suppose the following facts are known. There are many homeless people and, as things stand on any given night, only a limited stock of public housing, hotel rooms, and places in shelters that can be allocated to them. The circumstances of homeless individuals vary: some are with families, some are alone; some are sick, some are healthy; some have been homeless for months, others have just become homeless; some have the strength and morale to apply for a place, others wander helplessly in the streets. It is possible that an advocate who believes they all have a moral right to shelter will want to set up a rule whereby anyone who can prove she is homeless is assigned a place by a responsible official immediately, without further ado (until the available places run out). That would be clearly describable as a legal right to shelter. But it is equally possible that the homeless advocate will urge a more flexible arrangement than that—an arrangement that allows officials to match accommodation to need, to make quick judgments about who is sick and desperate and who is not, to hold some places in reserve for hapless folks found wandering in the rain late at night, and so on. And one can imagine that choice being made *on right-based grounds*: on the ground that, in the circumstances, this arrangement will better serve the moral principle that the homeless have a right to shelter.

To put the point strongly: a moral claim that people have the right to shelter is a claim about the importance of their getting shelter. It is not a claim about the importance of their being assigned shelter in accordance with a specific type of legal or bureaucratic procedure.

4 *From Legal Rights To Constitutional Rights*

Suppose everything I have said so far is wrong. Suppose the assertion of a moral right *is* always a moral demand for a legal right. Should we take the further step of saying that anyone who assents to (2), above, should also be committed to

(4) P (morally) ought to have a constitutional right to X

if her support for (2) is wholehearted? Does a person who is in favour of a legal right always have a reason to demand that extra level of protection?

Not necessarily. There are practical reasons and reasons of principle to make her hesitate. To secure constitutional protection, the proponent of the right will either have to agitate for constitutional reform or, if there is already a Bill of Rights, persuade those entrusted with the task of interpreting it to recognize the

new right under the heading of some existing provision. Either way, the political difficulties are considerable. The proponent of the right may well think that the process of securing constitutional protection would take too long or be too difficult, and that it may distract people from the more important task of actually making the legal provision that is called for.[28]

Those are strategic reasons for resisting the inference from (2) to (4). But suppose a political opportunity for constitutionalization has in fact arisen? What reasons of principle are there for hesitating in the face of that opportunity?

One point which is not *quite* as pragmatic as those already mentioned has to do with apprehensions about verbal rigidity. A legal right that finds protection in a Bill of Rights finds it under the auspices of some canonical form of words in which the provisions of the charter are enunciated. One lesson of American constitutional experience is that the words of each provision in the Bill of Rights tend to take on a life of their own, becoming the obsessive catch-phrase for expressing everything one might want to say about the right in question. For example, First Amendment doctrine in America is concerned to the point of scholasticism with the question of whether some problematic form of behaviour that the State has an interest in regulating is to be regarded as 'speech' or not. ('Is pornography speech?' 'Is burning a flag speech?' 'Is topless dancing speech?' 'Is pan-handling speech?' 'Is racial abuse speech?' and so on.) Yet surely this is not the way to argue about rights. Rights are principles of deep and pervasive concern. We may use the phrase 'freedom of speech' to pick out the sort of concerns we have in mind in invoking a particular right; but that is not the same as saying that the *word* 'speech' (as opposed to 'expression' or 'communication' etc) is the key to our concerns in the area. The same is true for other formulae of American constitutional doctrine: 'cruel and unusual punishment', 'free exercise' of religion', 'due process of law', etc.[29]

Of course, even statutory language will make use of some phraseology. The difference is that statutory language can readily be amended to meet our evolving sense of how best to get at the real issues at stake. If we think that one of the crucial tests for scrutinizing punishments is 'unusual-ness', we can write that into our statute. If later we see the merits of encouraging innovation in sentencing, we may want to express the proper constraints in some other way, and amend our criminal justice legislation accordingly. And of course this process of evolving phraseology is even easier if we are talking about legal recognition in the form of common law principles and precedents, and easier still if rights take the form of 'conventional' understandings subscribed to in the political community at large, as they have in Britain for many years. With that less articulate, less formulaic heritage of right-based concern, people can discuss issues of rights and limited government, issues of abortion, discrimination,

[28] The story of the Equal Rights Amendment in the United States would have been a sorrier one if all legislative initiatives against sex discrimination had rested on the success of this particular constitutional campaign. See Jane Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986).

[29] I have discussed this a little more in Jeremy Waldron, *The Law* (London: Routledge, 1990), 83–4, and in *Nonsense Upon Stilts*, 177–81.

punishment and toleration in whatever terms seem appropriate to them, free from obsession with the verbalism of a particular written charter.

For these reasons, then, the proponent of a given right may be hesitant about embodying it in a constitutionally entrenched Bill of Rights. She may figure that the gain, in terms of an immunity against wrongful legislative abrogation, is more than offset by the loss in our ability to evolve a free and flexible discourse.

But the deepest reasons of liberal principle have yet to be addressed. When a principle is entrenched in a constitutional document, the claim-right (to liberty or provision) that it lays down is compounded with an immunity against legislative change. Those who possess the right now get the additional advantage of its being made difficult or impossible to alter their legal position. That can sound attractive; but as W. N. Hohfeld emphasized, we should always look at both sides of any legal advantage.[30] The term correlative to the claim-right is of course the duty incumbent upon officials and others to respect and uphold the right. And the term correlative to the constitutional immunity is what Hohfeld would call a disability: in effect, a disabling of the legislature from its normal functions of revision, reform and innovation in the law. To think that a constitutional immunity is called for is to think oneself justified in disabling legislators in this respect (and thus, indirectly, in disabling the citizens whom they represent). It is, I think, worth pondering the attitudes that lie behind the enthusiasm for imposing such disabilities.

To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one's fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust: self-assurance in the proponent's conviction that what she is putting forward really *is* a matter of fundamental right and that she has captured it adequately in the particular formulation she is propounding; and mistrust, implicit in her view that any alternative conception that might be concocted by elected legislators next year or the year after is so likely to be wrong-headed or ill-motivated that *her own* formulation is to be elevated immediately beyond the reach of ordinary legislative revision.

This attitude of mistrust of one's fellow citizens does not sit particularly well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are being entrenched in this way. The substantive importance of a given right may well be based on a view of the individual person as essentially a thinking agent, endowed with an ability to deliberate morally and to transcend a preoccupation with her own particular or sectional interests. For example, an argument for freedom of speech may depend on a view of people as 'political animals' in Aristotle's sense, capable of evolving a shared and reliable sense of right and wrong, justice and injustice, in their conversations with one another.[31] If *this* is why one thinks free speech important, one cannot simply turn round and announce that the products of any deliberative process are to be mistrusted.

[30] Wesley N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1923).
[31] See Aristotle, *Politics*, Bk I, ch 2, 1253a1–18 (3).

If, on the other hand, the desire for entrenchment is motivated by a predatory view of human nature and of what people will do to one another when let loose in the arena of democratic politics, it will be difficult to explain how or why people are to be viewed as essentially bearers of rights. For in order to develop a theory of rights, we need some basis for distinguishing those interests which are characteristic of human dignity from those which are relatively unimportant in a person's activity and desires. If our only image of man is that of a self-seeking animal who is not to be trusted with a concern for the interests of others, we lack the conception of dignified moral autonomy on which such discriminations of interest might be based.

These are not intended as knock-down arguments against constitutionalization. All I have tried to show so far is that there is nothing obvious about combining a respect for rights with a profound mistrust of people in their democratic and representative capacities. Accordingly there is nothing perverse in saying: 'The reasons which make me think of the human individual as a bearer of rights are the very reasons that allow me to trust her as the bearer of political responsibilities. It is precisely because I see each person as a potential moral agent, endowed with dignity and autonomy, that I am willing to entrust the people *en masse* with the burden of self-government.' Once we see *this* as an intelligible set of attitudes, we might be more hesitant in expressing our enthusiasm for rights in terms of the disabling of representative institutions.

5 *Doing Philosophy*

The attitudes we take towards our fellow citizens will depend in part on how easy we think it is to come up with an adequate conception of the rights that deserve protection. If someone has developed such a conception and if, moreover, she thinks it a relatively easy task, she will tend to distrust anyone who comes up with a conception of rights that differs from her own. *She*, after all, thinks of herself as acting in good faith and since the task presents no special difficulties, it is likely that her good faith will have yielded good results. The only explanation, then, of other people's contrary results is that they must have been acting for some ulterior motive. To put it another way, if we hold the truths that *we* have come up with to be 'self-evident', our only explanation of the contrary results arrived at by other people is that they are either simpletons or rogues. Either way, we have reason (on this conception of the task) to embody our self-evident conclusions in immutable form as soon as possible in order to insulate them from the folly and chicanery of misguided revision or reformulation.

If, on the other hand, we take the view that the whole business of thinking about rights is fraught with difficulty and that it is something on which, with the best will in the world, people of good faith may differ, we will not evince the same distrust of our opponents' suggestions nor indeed the same dogmatic confidence in our own. Those who think it possible that they are mistaken should be less inclined to cast their conclusions in stone, and more open to the possibility that

debate among their fellow citizens will from time to time produce conclusions that are better than theirs.

Which of these views of our task is correct? A theorist of rights has to work out what rights people have, how they are to be formulated, and how important they are in relation to other moral and political considerations. Is this an easy task or a difficult one?

There is some pressure to insist on its facility. Talk of individual rights is often supposed to be a way of registering fairly basic objections to the arcane computations of the utilitarian calculus. It is the utilitarian who is supposed to be telling us that everything is all very complicated, and that whether we allow horrible things like torture, censorship, or the execution of the innocent depends on all the circumstances, long-run calculations of probability, etc. The theorist of rights, by contrast, is supposed to be the one who can produce the trump card, the peremptory argument-stopper: '*Thou shalt not kill.*' The idea of rights has often been seized on precisely as a way of avoiding the casuistry of trade-offs and complex moral calculations—a way of insisting that certain basics are to be secured and certain atrocities prohibited, come what may. But if rights themselves are morally complicated, the spectre of casuistry reappears. Complicated problems presumably require complicated solutions; but it was the *simplicity* of right-based constraints that was supposed to be their main advantage over other more recondite and precarious modes of moral reasoning.[32]

The sad fact is, however, that this simplicity and moral certainty is simply unavailable. No one now believes that the truth about rights is self-evident or that, if two people disagree about rights, one of them at least must be either corrupt or morally blind. In the thirty years or so of the modern revival of the philosophical study of rights, there has been a proliferation of rival theories and conceptions.[33] Each of these has occasioned an outpouring of essays, articles and symposia discussing, elaborating and criticizing their accounts.[34] In addition there are hundreds of articles devoted to particular rights or making particular points about the idea of rights,[35] as well as a number of important books attacking the idea of rights and the individualist presuppositions of that idea.[36]

[32] I have discussed these points further in Jeremy Waldron, 'Rights in Conflict', *Ethics*, 99 (1989), 508.

[33] As well as the works by Robert Nozick, John Rawls and Ronald Dworkin cited at the beginning of the article (see above, nn 1–3), one might mention the following major contributions: Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986); Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982); and Raz, *Morality of Freedom*, op cit, n 10. This list is by no means complete.

[34] See, for example, the following collections of essays: Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (Totowa: Rowman and Allenheld, 1983); Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls 'A Theory of Justice'*, Second Edition (Stanford: Stanford University Press, 1989); Jeffrey Paul, *Reading Nozick: Essays on 'Anarchy, State and Utopia'* (Oxford: Basil Blackwell, 1982); Edward Regis, *Gewirth's Ethical Rationalism: Critical Essays* (Chicago: University of Chicago Press, 1984); Symposium on the work of Joseph Raz, (1989) 62 *Southern California Law Review*, numbers 3 & 4.

[35] Two recent anthologies (with bibliographies) are David Lyons (ed), *Rights* (Belmont: Wadsworth, 1979) and Waldron (ed), *Theories of Rights*, op cit, n 9.

[36] See, for example, Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1981); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); and Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991). For a critical discussion of some of this literature, see Waldron, *Nonsense Upon Stilts*, op cit, n 23, 166–209.

To believe in rights is to believe that certain key interests of individuals, in liberty and well-being, deserve special protection, and that they should not be sacrificed for the sake of greater efficiency or prosperity or for any aggregate of lesser interests under the heading of the public good. Now some people think this whole idea is misguided; but even those who propound it in political philosophy recognize its difficulty. Any theory of rights will face disagreements about the interests it identifies as rights, and the terms in which it identifies them. Those disagreements will in turn be vehicles for controversies about the proper balance to be struck between some individual interest and some countervailing social consideration. For example, in articulating and defending a right to free speech, we need to think through the congestion of values and principles that we find in crowded theatres that are not on fire, in public libraries where 'Silence' is enjoined, and in university lectures where racist hypotheses are being entertained. In addition, theories of rights have to face up to controversies about the forms of priority that they establish: lexical priorities, weighted priorities, agent-relative side constraints, agent-relative prerogatives and so on. Our experience with these issues in moral philosophy indicates that their prominence in the literature is directly proportional to both their difficulty and their importance. Finally, theories of rights must develop accounts of who they take to be right-bearers: they must develop theories of the person, and articulate those into an account of the rights (or whatever) of foetuses, infants, the elderly, the comatose, the mentally ill, and so on. So even within the terms of a given theory of rights, its development and articulation is a complex and difficult task.

How should a philosopher approach these difficulties? The first and most obvious point is that, in her own work, she should recognize the possibility that she is mistaken. Robert Nozick noted in the preface to *Anarchy, State and Utopia* that each individual author tends to write as though mankind has been struggling for aeons with some philosophical or ethical problem, but 'he finally, thank God, has found the truth and built an impregnable fortress around it'.[37] In fact each of us is familiar with the business of argumentation, objections, answers to objections, rejoinders, and revisions. Indeed, we often use that apparatus to structure the way we write: here is my preliminary thesis; here is my account of the main objections; here are the answers to all but one of the objections; and here are the revisions that are needed to accommodate the unanswerable objection. That mode of presentation and the ethic of fallibility it evinces are the life-blood of the philosophical community.

Of course everyone thinks her own current position is correct; otherwise she would not be putting it forward. In the area of rights, where it is precisely questions of relative urgency and moral priority that are at stake, everyone will think that she has got the priorities right and that alternative views are wrong. Though each should think it possible she is mistaken, it is not necessarily a good idea for her to incorporate that misgiving into the substance of her theory. There

[37] Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), xii.

is a difference between being modest about one's conclusion and modifying the conclusion to take account of that modesty. Modifying the conclusion may well diminish, rather than enhance, the proponent's conviction that it is correct. Still, though one may be convinced now that *this*, rather than some more modest formulation, is the correct one, it is part of philosophical maturity to be able to combine that conviction with a recollection of past occasions where similar beliefs have had to be abandoned in the face of philosophical difficulty, and with an openness to counter-argument and refutation in the future.[38]

Such fallibilism can be taken in a purely Cartesian spirit: a solitary thinker's openness to her own revisions, self-criticisms and reformulations. For most of us, however, it is an aspect of the way we do philosophy *together*, as members of a community of thinkers and critics. We accept and embrace the circumstance of a plurality of views and the trenchant disagreements they give rise to. Again, the discipline thrives on this. The interplay of arguments is expected to produce better theories that will form the basis for an even more vigorous debate, and so on. In these debates, each of us has a responsibility to take the perspective of the philosophical community as well as the perspective of the particular view she is defending. From the latter perspective, one is a passionate partisan of a particular theory. From the former perspective, however, one knows that it is wrong to expect any particular theory, no matter how attractive or well argued, to survive the process of debate unscathed. One recognizes that the debate has a point: to use collective interaction as a way of reaching towards complicated truth. Simple truths, self-evident truths may form in single minds, but complicated truths (in which category I include all propositions about individual rights) emerge, in Mill's words, only 'by the rough process of a struggle between combatants fighting under hostile banners'.[39]

6 *Disagreement and Authority*

Politics, as Hannah Arendt once remarked, starts from the fact that not one man, but *men*, inhabit the earth.[40] One of the great problems of political philosophy is to explain how there can be a society, ordering and governing itself, taking initiatives and functioning as an agent, in the face of the plurality of its members and the disagreements they have with one another on the question of what is to be done.

Recent political philosophy with its emphasis on rights and justice has tended to neglect this topic. We have recognized (quite rightly) the importance of justice, and the importance of thinking hard about what justice requires in the

[38] The classic defence of such fallibilism is Mill, *On Liberty*, ch 2. See also Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (London: Routledge and Kegan Paul, 1969), esp chs 16–20.

[39] J. S. Mill, *On Liberty*, ch 2, para 36 (58). The whole sentence reads: 'Truth in the great practical concerns of life, is so much a question of the reconciling and combining of opposites that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.'

[40] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 234.

way of distributions, structures, and respect for individuals and groups. However, given the inevitability of disagreement about all that, a theory of justice and rights needs to be complemented by a theory of authority. Since people disagree about what justice requires and what rights we have, we must ask: who is to have the power to make decisions, or by what processes are decisions to be taken, on the practical issues that the competing theories of justice and rights purport to address? Majoritarian democracy is the theory of authority with which most of us are familiar, but others include 'Toss a coin', 'Let the king decide', and 'Leave it to the judges'.

There are a few points to notice immediately about the problem of authority, before we consider how a right-based theorist should try to answer it.

First, the need is for us to *complement* our theory of rights with a theory of authority, not to *replace* the former with the latter. The issue of what counts as a good decision does not disappear the moment we answer the question 'Who decides?'. On the contrary, the function of a theory of justice and rights is to offer advice to whoever has been identified (by the theory of authority) as the person to take the decision. If there are competing theories of justice and rights, then the authority is offered competing advice, each theory putting itself forward as the best product available.

Secondly, an answer to the question of authority must really settle the issue. It is no good saying, for example, that when people disagree about rights, the person who should prevail is the person who offers *the best conception of rights*. Each person regards her own view as better than any of the others; so this rule for settling on a social choice in the face of a disagreement is going to reproduce exactly the disagreement that called for the rule in the first place. The theory of authority must identify some view as the one to prevail, on criteria other than those which are the source of the original disagreement.[41]

It is important to notice how this point applies to disputes about rights. All of us want to see an end to injustice, oppression and the violation of human rights; none of us is happy with political procedures that allow such violations to take place. This enthusiasm sometimes leads people to qualify their views about authority with a rider to protect individual rights. For example, someone may say, 'If people in society disagree about anything, then a decision should be taken by majority voting, *provided individual rights are not violated thereby*.' But the emphasized rider will not work in a theory of authority, at least for a society in which rights themselves are a subject of political disagreement. People who disagree *inter alia* about rights will disagree about what that theory of authority requires, and that latter disagreement will be nothing but a reproduction of the problem about rights which evoked the need for a theory of authority in the first place.

[41] This point is due to Thomas Hobbes. Any theory that makes the authority of the sovereign depend on the moral goodness of his commands is self-defeating, for it is precisely because men *disagree* about good and evil that they need a sovereign. See Hobbes, *Leviathan*, (ed) C. B. Macpherson (Harmondsworth: Penguin Books, 1968), ch 18 and Hobbes, *De Cive: The English Version*, (ed) H. Warrender (Oxford: Clarendon Press, 1983), VI. 6.

Similarly, we cannot say, with Ronald Dworkin, that the whole *point* of rights is to 'trump' or override majority decisions.[42] For rights may be the very thing that the members of the society are disagreeing about, the very issue that they are using majority voting to settle. If we say, in a context where people disagree about rights, that rights may 'trump' a majority decision, it is incumbent on us to say which of the competing conceptions of rights is to do the trumping, and how that is to be determined.

Thirdly, it follows from what has been said that there will sometimes be a dissonance between what one takes to be the just choice and what one takes to be the authoritative choice in political decision-making. A person who holds a complete political theory—one that includes a theory of authority as well as a theory of justice and rights—may find herself committed to the view that an unjust decision should prevail. Her theory of justice may condemn policy B and prefer policy A on right-based grounds, but her theory of authority may mandate a decision procedure (designed to yield a social choice even in the face of disagreement about the justice or injustice of A and B) which, when followed, requires that B be adopted.

Given the second point that I made, this prospect is simply unavoidable. In a famous article, Richard Wollheim called it 'a paradox in the theory of democracy'. He imagined citizens feeding their individual evaluations of policies into a democratic machine which would always choose the policy with the greatest number of supporters. The paradox arises from the fact that each citizen, if she is a democrat, will have an allegiance to the machine and its output, as well as to the evaluation which counts as her own whole-hearted individual input. It is the paradox that allows 'one and the same citizen to assert that A ought to be enacted, where A is the policy of his choice, and B ought to be enacted, where B is the policy chosen by the democratic machine'.[43] But Wollheim is wrong to describe this as a paradox of *democracy*. It is a general paradox in the theory of authority—a paradox which affects any political theory that complements its account of what ought to be done with an account of how decisions ought to be taken when there is disagreement about what ought to be done.

That point is important in the present context. American-style judicial review is often defended by pointing to the possibility that democratic majoritarian procedures may yield unjust or tyrannical outcomes. And so they may. But so may *any* procedure that purports to solve the problem of social choice in the face of disagreements about what counts as injustice or what counts as tyranny. The rule that the Supreme Court should make the final decision (by majority voting among its members)[44] on issues of fundamental rights is just such a procedural

[42] Dworkin, *Taking Rights Seriously*, 199–200.

[43] Richard Wollheim, 'A Paradox in the Theory of Democracy', in P. Laslett & W. Runciman (eds), *Philosophy, Politics and Society*, Second Series (Oxford: Basil Blackwell, 1969), 84.

[44] So it is a little misleading to describe the democratic objection to judicial review in the US as 'the counter-majoritarian difficulty'—cf Alexander Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), 16. The US Supreme Court is a majoritarian institution; the problem is the very small number of participants in its majoritarian decision-making.

rule. It too may (and sometimes has) yielded egregiously unjust decisions.[45] Anyone whose theory of authority gives the Supreme Court power to make decisions must—as much as any democrat—face up to the paradox that the option she thinks is just may not be the option which, according to her theory of authority, should be followed.

Of course, as Wollheim argued at the end of his essay, the paradox does not really involve a contradiction. A person who believes that A is the right decision, but B the decision that should be implemented, is offering answers to two different, though complementary questions. That B should be implemented is her answer to the question, 'What are *we* to do, given that we disagree about whether A or B is just.' That A is the right decision is her contribution to the disagreement that calls forth that question.[46]

One final point. That we need a theory of authority to settle disagreements is in no way a concession to moral subjectivism or conventionalism or relativism. One can recognize the existence of disagreement in society, including disagreement on matters of rights and justice, and one can acknowledge that some disagreements are, for practical purposes, irresolvable, without staking the meta-ethical claim that there is no fact of the matter about the issue that the participants are disputing.[47] Earlier I argued that 'Choose the right answer' is not a useful rule for action in the face of disagreements. The rejection of that rule is not to be seen as a move away from moral realism towards some more relativist meta-ethic. It is simply a response to what must be for a realist the unhappy fact that people disagree implacably about what the objectively right answer is.[48]

7 *Philosophical Debate and Political Participation*

Philosophers disagree among themselves and citizens disagree among themselves about issues of rights and justice. They disagree about welfare and taxation, about free speech and the rule of law, about equal opportunity and substantive equality. How should the philosophers regard the disagreements and discussions that take place among the citizens? I suggested in the previous section that the philosophers have a responsibility to think about the issue of authority: how is society to act when its members disagree? I now want to suggest that when we do so, we should think of the various people taking part in the social disagreement as being in many respects *just like us* when we disagree in a seminar or a journal. Or rather they are just like us with this one proviso: we have the luxury of not having to make a decision; they have to engage not only in hard thinking about what is

[45] For an uncontroversial example of an egregiously unjust decision, see the '*Dred Scott*' decision, *Scott* v *Sandford* 60 US (19 How) 393 (1857).

[46] See also the discussion in Kim Scheppele and Jeremy Waldron, 'Contractarian Methods in Political and Legal Evaluation', (1991) 3 *Yale Journal of Law and the Humanities* 195, esp 227–30.

[47] For the contrary view, see Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984), 129: 'Where there is certain knowledge, true science, or absolute right, there is no conflict that cannot be resolved by reference to the unity of truth, and thus there is no necessity for politics.'

[48] I have discussed this much more extensively in Jeremy Waldron, 'The Irrelevance of Moral Objectivity', in R. George (ed), *Natural Law* (Oxford: Clarendon Press, 1992).

just and what rights people have, but also in what we in the academy may too easily dismiss as the sordid and distasteful business of actual collective decision-making in the absence of moral consensus.

We pride ourselves, of course, that our thinking in books, articles and seminars is more reasoned and more profound than the thinking engaged in by working politicians and their constituents. And so it should be: in the social division of labour, it is our task to take time and energy to think these things through as carefully as it is possible to think them. But it is a mistake, I think, to regard our thought as different in kind from that of a citizen-participant in politics. Political philosophy is simply conscientious civic discussion without a deadline.[49]

To think that theoretical discussions are different in kind is not just an error of arrogance; it is a substantial philosophical mistake. At least since the seventeenth century, our conception of *argument* in political philosophy has been guided by the idea that social, political and legal institutions are to be, in principle, explicable and justifiable to all those who have to live under them. We have rejected the esoteric in political theory; we have rejected the idea of *arcana imperii*.[50] The model-theoretic ideas of consent and social contract, and the corresponding constraints of publicity and transparency, commit us to producing arguments that purport to be intelligible to anyone whose interests they affect, and that—in spirit, if not in idiom—are consonant with the arguments that they would find persuasive in their conversations with one another. There is, as I have argued elsewhere, an important connection between liberal argumentation and the Enlightenment conviction that everything real can in principle be explained, and everything right can in principle be justified, to everyone.[51] Modern philosophy evinces a commitment to the idea that theoretical argument aims not merely to justify laws or political proposals, but to justify them *to* the ordinary men and women whom they will affect.

For present purposes, the implication of this democratic model of political theory is that each of us should think of her conception of rights as a particularly well-worked out opinion or position which, in outline, might be held by any citizen. Similarly, we should think of the theoretical disagreements we have among ourselves as particularly civil, thoughtful and protracted versions of the disagreements that take place among citizens in the public realm. Conversely, when we come across a citizen or party of citizens holding a view about rights that differs from our own, we should think of that along the lines that we think of a colleague's contrary conception: something to be disagreed with but respected, treated as a good faith contribution to a debate in which nothing is self-evident.

These considerations should be sufficient to make us pause before adopting some of the more disrespectful images of democratic decision-making that one finds in constitutionalist writings. Cynics sometimes say that legislative and

[49] For a contrary view, see Hegel's Preface to the *Philosophy of Right*, trans T. M. Knox (Oxford: Oxford University Press, 1967), 5 ff.

[50] Cf Peter Donaldson, *Machiavelli and Mystery of State* (Cambridge: Cambridge University Press, 1988).

[51] See Jeremy Waldron, 'Theoretical Foundations of Liberalism', (1987) 37 *Philosophical Quarterly* 127, esp 134 ff.

electoral politics is entirely a matter of self-interest, and that representatives and voters never raise their minds above the sordid question, 'What's in it for me?' This of course is an empirical issue, but I believe the cynicism is exaggerated.[52] Certainly the idiom of self-interest is not the idiom in which citizens' views about rights are normally expressed. Consider the debate about abortion. The pro-life and pro-choice factions cannot both be correct on the issues of whether foetuses have rights and whether women have the right to choose abortion, but it seems clear that both sides are engaged in good faith on exactly those general and difficult questions of ethics. Each group appears to be arguing for a particular view about what rights there are, and what sort of beings have them. We might, to sustain our cynicism, insist that these philosophical convictions are really only a cover for self-interest, in some less high-minded sense, so that the political debate should be discredited on that account. But then it will be hard to limit this cynicism. Why not say that about the opinions of judges? (Many people do.) Why not say it about constitution-framers? Why not say it about *anyone* who purports to think or write on such an issue. On the other hand, if we are willing, as most of us in our vanity are, to say that at least when *philosophers* write about abortion in professional journals they are not motivated by covert self-interest, why are we not prepared to say this about ordinary citizens, who certainly look and sound as earnest and high-minded as we do, when they disagree with one another?

8 *The Right to Participate*

Fortunately perhaps, our respect for the political thinking of ordinary citizens does not stem solely from our willingness to see similarities between what they are doing in political debate and what we are doing in our seminars. It stems also from our democratic principles, and from our conviction that self-government and participation in politics by ordinary men and women, on equal terms, is itself a matter of fundamental right.

I suppose one could imagine a theory of rights that accorded no great importance to the exercise of powers of political deliberation. It would be a rather Whiggish Lockean theory of the Augustan Age, emphasizing only rights to life, property and civil liberty, and regarding political participation in elections and so on as strictly one instrument among others to secure those ends. If it turned out that basic material interests could be secured better by non-participatory institutions, then the erstwhile electors would gratefully abjure politics forever and return to commerce or agriculture..

Some say this Lockean position is distinctive of modern 'liberalism' and that one has to be a civic republican to deny it.[53] I think that is false, but it does not matter. The point is that all interesting modern theories of individual rights *do* emphasize rights to political participation. These range from rights to political

[52] See further Waldron, 'Rights and Majorities', op cit, n (†) (p 18), 58–60.

[53] See Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge: Harvard University Press, 1988), 4–17.

liberty—free speech, assembly, association, and the formation of parties—all the way through to what we may call the Hohfeldian *powers* of representative government—the right to stand for office and the right to have one's vote counted. More abstractly, they amount to the freedom to contribute to public deliberations and the power to have one's voice taken seriously in public decision-making. These have been the very stuff of rights, at least since 1789.[54]

Why do we demand respect for these rights? One answer is that we think of people as political animals on the Aristotelian model, and we believe that participation in the public realm is a necessary part of a fulfilling human life.[55] To deny people the opportunity for such participation is to deny part of their essence. Yet few would want to leave the matter there, saying that participation is important simply for the performance values associated with each person's contribution, as though the content of the participation did not matter.[56] Participation is valued also as a mode of self-protection: each individual acts, to some extent, as a voice for those of her own interests that ought to be taken seriously in politics. We need not think of this in a crude utilitarian way, as though votes were inputs and the process were the institutional embodiment of a social welfare function. The heart of any theory of right is the insistence that certain individual interests are of paramount importance, and that their importance is to be appreciated at least in part from the point of view of those whose interests they are. More than anyone else, a rights-theorist should be uneasy about political arrangements that tend to silence such voices or that evince distaste for their clamour in a democratic forum.

Then there are arguments about the quality of public deliberation. The recognition of participatory rights is not just a grudging concession by those who have knowledge to the childish enthusiasms of those who do not. As my earlier remarks about philosophical debate indicated, the participation of the many acts as a useful corrective to the blinkered self-confidence with which one individual may hold her view.[57] Participation by all is valuable because of the importance of assembling diverse perspectives and experiences when public decisions are being taken; and it is valuable also because the sheer experience of arguing in circumstances of human plurality helps us develop more interesting and probably more valid opinions than we could manufacture on our own.[58]

In addition, there are points to be made about dignity, autonomy and self-government. I noted earlier that modern theories of rights are usually predicated on a view of the individual as essentially a thinking agent, endowed with the

[54] See the French National Assembly's *Declaration of the Rights of Man and the Citizen*, 1789, Article 6: 'Legislation is the expression of the general will. All citizens have a right to participate in shaping it either in person, or through their representatives.'

[55] Aristotle, *Politics*, Bk I, ch 2, 1253a9 ff: 'Nature, as we say, does nothing without some purpose; and for the purpose of making man a political animal, she has endowed him with the power of reasoned speech.' (This is from the translation by T. A. Sinclair (Harmondsworth: Penguin Books, 1962), 28.)

[56] Hannah Arendt comes close to this, in *On Revolution* (Penguin Books, 1973), 119, and is roundly criticized by J. Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press, 1985), 98.

[57] See section 5, above.

[58] This theme can be traced from Aristotle's doctrine of 'the wisdom of the multitude' in *Politics*, Bk III, ch 11 through to Mill, *On Liberty*, ch 2, esp para 36 (57 ff).

ability to deliberate morally and to govern her life autonomously. Connected with that is the view that the obligations that consort most deeply with our autonomy are those that are, in some sense, self-imposed. Pushed in one direction, this Kantian allegiance to autonomy leads to anarchy.[59] But if we take our situation in social life seriously, we may say with Rousseau that the only thing that 'self-imposed' can mean in a community is participation on equal terms with others in the framing of laws.[60] Or we can say at least what John Stuart Mill emphasized, that those who are to be required to comply with a decision are surely entitled to *some* sort of voice in that decision: 'If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth. . . .'[61]

These paragraphs do not amount to a full theory of democracy but they are, I hope, enough to indicate the depth of the connection between the idea of civic participation and the ideas that lie at the heart of modern conceptions of rights. Both ideas represent people as essentially agents and choosers, with interests of their own to protect and, in their dignity and autonomy, as beings who flourish best in conditions that they can understand as self-government. The modern theory of democracy represents individuals not only as blind pursuers of self-interest, but as having the capacity to engage in thought and principled dialogue about the conditions under which everyone's interests may be served. An exactly similar moral optimism can be inferred from theories of rights. Each person's rights are matched by duties that she bears correlative to the rights of others: the rights that I have are universalizable and the principles they embody apply equally to all. This universality is at least partly determinative of their content: what my right is a right *to* depends partly on what can be guaranteed on equal terms, without mutual interference, to everyone. Since claiming and asserting a right is necessarily a self-conscious business, it follows that each right-bearer is already familiar with the idea of the common good at least in the sense of a universalized, mutually respectful and reciprocal *system* of rights. The rights of others are matters she already takes into account in working out the content of the rights she claims as her own.

Above all, the appearance of democratic participation on the list of rights that we value is a concession to human plurality. It is the recognition, in behalf of each person, that she too has a vision of how a human community may be organized, and that her vision is entitled not only to be respected in the sense of 'not suppressed', but also to *count* in whatever political decision-making goes on in the society in which she lives.

[59] See Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper, 1976).

[60] Jean-Jacques Rousseau, *The Social Contract*, edited by Maurice Cranston (Harmondsworth: Penguin Books, 1968), Bk I, ch 6: '"How to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others obeys no-one but himself and remains as free as before." This is the fundamental problem to which the social contract holds the solution.' (60).

[61] John Stuart Mill, *Considerations on Representative Government* (Buffalo, Prometheus Books, 1991), ch VIII, 173.

9 *The Proceduralist Gambit*

What about the constitutional importance of the participatory rights themselves? It may be thought that, according to the logic of my argument, these rights *at least* should be entrenched. Since it is the right to a say in the determination of what rights we have that is so important, surely *this* should be put beyond the reach of majoritarian revision. In the history of American attempts to square the circle of judicial review with the principles of democracy, this has been a common argument: democracy must protect itself from the majoritarian abrogation of its own constitutive structures; although there may be something undemocratic about entrenching substantive rights against majoritarian abrogation, there is nothing undemocratic about protecting the procedural rules of democracy in that way.[62]

Unfortunately, the proceduralist argument will not work. The truth about participation and process is as complex and disputable as anything else in politics, and the points made in previous sections apply equally to these issues. People disagree about how participatory rights should be understood and about how they should be balanced against other values. They have views on constituency boundaries, proportional representation, the frequency of elections, the funding of parties, the relation between free speech and political advertising, the desirability of referendums, and so on. Respect for their political capacities demands that their voices be heard and their opinions count on these matters, as much as on any matter. Honouring self-government does not stop at the threshold from substance to procedure.

I am not suggesting that we can afford to leave these matters open. Because we disagree, there have to be authoritative procedures for settling disputes about what should be our authoritative procedures. Now as we noticed in section 6, the one option that is *not* open to us in settling these disputes is to lay down as an authoritative rule, 'Choose the best procedure'. That is a non-starter because it reproduces and does not settle the disagreement we began with. What we have to determine is who will choose the procedures we will use and what procedures they will use to choose them. Vesting that decisional power in a small group of judges is one solution; vesting it in the ordinary legislative process is another. Presumably we should choose between these two options in the same way as we make any decision of this kind. If we are partisans of democracy, holding the values that were sketched out in the previous section, we will I think opt to entrust these decisions about procedure to the people and their representatives, figuring that it is an insult to say that the issues are too important or perhaps too formalistic for them (rather than the judges) to decide.

[62] The most eloquent recent expression of this doctrine is John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). Ely concedes that the entrenchment of substantive values would be an affront to the process of democratic self-government, but he sees no such affront in the entrenchment of the process itself and of the values and principles adjacent to it: 'substantive decisions are generally to be made democratically in our society and constitutional decisions are generally to be limited to policing the mechanisms of decision'. (ibid, 181.)

But, it may be objected, in a dispute about *procedure*, are these not the very points at issue? If we really disagree about the proper scope of democratic decision-making, how can it be right to use democratic decision-procedures to settle that disagreement? The point seems a worrying one, but the worry dissolves when we realize that the same objection would apply to *any* solution of the problem of authority in the context of a disagreement about procedure. Since there are disagreements about how to settle disagreements (ie disagreements about authority), and since we need those disagreements settled too, we will always be in the uncomfortable position of using the procedures advocated by one or other of the disputants to settle the very dispute to which she is a party. Though that may be uncomfortable, it is not question-begging. The use of decision-procedure A to settle the disagreement between those who think that decision-procedure A should be used and those who think we should use decision-procedure B does not necessarily load the dice in favour of the first of these outcomes. We are all familiar with political organizations that manage to reform their own decisional procedures: that means we are familiar with cases in which the use of decision-procedure A yields as an output the conclusion that, henceforth, procedure B, rather than A, should be used.

In addition, it is worth noting that the distinction between substance and democratic procedure is a notoriously difficult one to sustain in politics. Many of the values we affirm in our opinions about democratic procedures are also values which inform our views about substantial outcomes. For example, if we favour democratic participation on grounds of respect for individual autonomy—recognizing an element of self-authorship in one's participation in collective self-governance—we may well find it is the basis of many substantive outcome evaluations also. The strongest arguments for free religion (a liberty right which is not also a right of *political* participation) or public education (a welfare right rather than a political power) implicate that same basic consideration. Since the same fundamental values are implicated in both spheres, it will be difficult to keep constitutional jurisprudence apart from the consideration of other more obviously substantive concerns.

Moreover, we value participation not just as an end in itself but also because we think that this is one way to ensure that each person gets what is hers by right. Ronald Dworkin has argued that the case for one particular conception of the political process rather than another must always be based in the last resort on considerations of outcome: what ends up happening to people as a result of the operation of the institutions and procedures in question. 'The flight from substance', he says, 'must end in substance.'[63] I think he exaggerates that: there is a certain dignity in participation, and an element of insult and dishonour in exclusion, that transcends issues of outcome. When we are told, by those who would otherwise be our political masters, that some issue is to be decided by us, by a vote, there is an element of pride and egalitarian respect that is in principle

[63] Dworkin, 'The Forum of Principle', in *A Matter of Principle*, 69; the argument is developed, ibid, 59–69.

separable from what we hope to achieve by voting. Still, even if Dworkin is half right, and particularly if the issues are tangled, we can say that any entrenchment of a set of putatively procedural principles would be *at least in part* the entrenchment of a particular view of the substantive outcomes to which each person is entitled. To that extent, it amounts to the political disempowerment of the proponents of any rival view on that matter of substance.

10 *Imperfect Democracy*

It is time to descend now from ideal to reality. As a matter of fact, the enactment of a Bill of Rights need not involve the entrenchment of one particular view of individual rights beyond the reach of challenge or reform. A Bill of Rights can specify procedures for amendment; and certainly one upshot of the argument I have made is that we should insist on such opportunities for constitutional revision, for they give a politically empowered people the chance to think afresh about their understanding of individual rights.[64] However, even if the efforts of rights-proponents fall short of absolute entrenchment, there is a temptation to make the amendment process as difficult as possible, a temptation often motivated by the same self-assured mistrust of one's fellow citizens that I have been criticizing throughout this paper. At the very least, it is thought appropriate that any amendment to a Bill of Rights should require a super-majority, and often the procedural obstacles that are proposed are much more formidable than that.

The point of such super-majoritarian requirements is, presumably, to reduce the probability that any amendment will be successful. To the extent that that is the aim, one needs to ask: how is the Bill of Rights to be made responsive to changing circumstances and different opinions in the community over time about the rights we have and the way they should be formulated? Are the formulations of one generation to be cast in stone, and given precedence over all subsequent revisions, save for the rare occasion on which the obstacles to amendment can be surmounted? Or are there to be, in effect, other and even less democratic procedures for constitutional revision than these?

The experience of the United States indicates the importance of the latter possibility. For, of course, *there* it would be quite misleading to suggest that the formal amendment procedure exhausts the possibilities for constitutional revision. In addition to the processes specified in Article V of the US Constitution, changes in the American Bill of Rights have come about most often through the exercise of judicial power. The Supreme Court is not empowered to alter the written terms of the Bill of Rights. But the justices do undertake the task of altering the way in which the document is interpreted and applied, and the way in which individual rights are authoritatively understood—in many cases with drastic and far-reaching effects.

[64] The opportunity for constitutional amendment is celebrated, in the American context, in Bruce Ackerman, 'The Storrs Lectures: Discovering the Constitution', (1984) 93 *Yale Law Journal* 1013.

I shall not in this article consider the intriguing jurisprudential issue of how these alterations should be described: literary interpretation, constructive interpretation, or the raw exercise of legislative power by the courts. I shall use the general term 'revision' to refer to any substantial change in the official understanding of rights, whether or not it involves a change in constitutional wording. (Thus, for example, the decision in *Roe* v *Wade*,[65] whatever its merits, was undoubtedly a revision, notwithstanding the fact that none of the Articles in the Bill of Rights was changed in its wording thereby.)

Members of the higher judiciary in the United States have the power to revise the official understanding of rights for that society and, when they do, their view prevails. The ordinary electors and their state and Congressional representatives do not have that power, at least in any sense that counts. A proposal to establish a Bill of Rights for Britain, judicially interpreted and enforced, is a proposal to institute a similar situation: to allow in effect routine constitutional revision by the courts and to disallow routine constitutional revision by Parliament. I hope it is easy to see, in the light of what I said in Section 8, why this arrogation of judicial authority, this disabling of representative institutions, and above all this quite striking political inequality, should be frowned upon by any right-based theory that stresses the importance of democratic participation on matters of principle by ordinary men and women.

Responses to this critique take three forms. First, it is argued that the judicial power of interpretation and revision is simply unavoidable. After all, it is the job of the courts to apply the law. They cannot do that except by trying to understand what the law says, and that involves interpreting it. As Dworkin put it (for the American context),

> If the Constitution, properly interpreted, does not prohibit capital punishment, then of course a justice who declared that it is unconstitutional for states to execute criminals would be changing the Constitution. But if the Constitution, properly interpreted, does forbid capital punishment, a justice who *refused* to strike down state statutes providing death penalties would be changing the Constitution by fiat, usurping authority in defiance of constitutional principle. The question of law, in other words, is inescapable.[66]

However, the inescapability of judicial interpretation does not settle the issue of whether *other* institutions should not also have the power to revise the official understanding of rights. On any account of the activity of the US Supreme Court over the past century or so, the inescapable duty to interpret the law has been taken as the occasion for serious and radical revision. There may not be anything wrong with that, but there is something wrong in conjoining it with an insistence that the very rights which the judges are interpreting and revising are to be put beyond the reach of *democratic* revision and reinterpretation.

In the end, either we believe in the need for a cumbersome amendment process or we do not. If we do, then we should be disturbed by the scale of the revisions

[65] 410 US 113 (1973), holding that the Constitution establishes a right to privacy that covers a woman's decision whether or not to have an abortion.

[66] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 370–1.

in which the judges engage (inescapably, on Dworkin's account). They find themselves routinely having to think afresh about the rights that people have, and having to choose between rival conceptions of those rights, in just the way that traditional arguments for making amendment difficult are supposed to preclude. It is no answer to this that the amendment process focuses particularly on changes in constitutional *wording*, and that the judges are not assuming the power to make verbal alterations. For one thing, judicial doctrine in the US has yielded catch-phrases (such as 'clear and present danger', or 'substantive due process', or 'strict scrutiny') which have become as much a part of the verbalism of the American constitutional heritage as anything in the Constitution itself. For another thing, it cannot be that the *words* matter more—and so need more protection from change—than our substantive understanding of the content of the rights themselves.

If, on the other hand, we think it desirable that a Bill of Rights should be treated as 'a living organism . . . capable of growth—of expansion and of adaptation to new conditions',[67] then we do have to face the question of authority: who should be empowered to participate in this quotidian organic process? Now, if Dworkin is right, the question is not 'Who?' but 'The judges and who else?', for the judges' participation is inescapable. But if it is really thought to be necessary for society 'to adapt canons of right to situations not envisaged by those who framed them, thereby facilitating their evolution and preserving their vitality',[68] it is difficult to see why the ordinary people and their representatives should be excluded from this process. Or rather—and more disturbingly—it is all to easy to see why: those who want an adaptive constitution do not trust the people to participate in its adaptation. That distrust, it seems to me, is something we should recoil from, on the same right-based ground as we recoil from any attempt to exclude people from the governance of the society in which they live.

A second response is to appeal, not to the inescapability of judicial power, but to its democratic credentials. Judicial review, it may be said, *is* a form of democratic representation, albeit a rather indirect form. In the US, justices are nominated to the Supreme Court by the President and their appointment is ratified by the Senate, and in the United Kingdom appointments to the higher judiciary are made on the advice of the Prime Minister, who is of course head of the elected government. To that extent, the authority of a judge is an upshot of the exercise of elected representative power, and recent American experience shows that occasionally something of an electoral issue can be made of who a Presidential candidate's Supreme Court nominees are likely to be.

But it is not enough to show, as this argument does, a scintilla of democratic respectability in the constitution of judicial power. For that does not show that the courts should have prerogatives that the people and their directly elected representatives lack, nor does it establish that when judicial authority clashes

[67] Justice Brandeis, quoted in William Brennan, 'Why Have a Bill of Rights?', (1989) 9 *OJLS* 426.
[68] Brennan, 'Why Have a Bill of Rights?' 426. (These are Brennan's own words now, not those of Brandeis.)

with parliamentary authority, the former ought to prevail. The sponsors of a piece of legislation struck down by a court can also point to a democratic pedigree. They can say, moreover, that if the people disagree with their legislation, they can hold them accountable for it at the next election, throw them out of office, and elect MPs who are pledged to repeal it, and so on. Nothing like that can be said in behalf of the judges.

In other words, the second response goes wrong by failing to see that the issue is essentially a *comparative* one. If a majority of judges in the House of Lords, for example, strikes down legislation passed by majoritarian processes in parliament, then the voting powers of a few judges are being held to prevail over the voting powers of the people's representatives. To provide a *democratic* justification for the judges' prevailing, one has to show not only that they have democratic credentials but that they have a *better* democratic claim than that asserted in the legislative action in question. I don't know of any jurist who can maintain that (with a straight face).[69]

Consider, moreover, how artificial this line of argument is. It is true that judges are appointed by elected officials. But the courts are not, either in their ethos or image, elective institutions, whereas parliament—whatever its imperfections—obviously is. Both in theory and in political practice, the legislature is thought of as the main embodiment of popular government: it is where responsible representatives of the people engage in what they would proudly describe as the self-government of the society. Now there are lots of dignified ways of describing the judiciary, but 'locus of representative authority' is unlikely to be one of them. Since my argument is in part about the respect and honour we accord to the people in our constitutional structures, it is important to understand that when a court strikes down a piece of legislation, a branch of the government that neither thinks of itself, nor is thought of, as a representative institution is striking down the act of an institution that is seen in more or less precisely that way.

Thirdly and perhaps most insidiously, it is argued that the objection to judicial power is a weak one, since both legislative and plebiscitary channels are rather imperfect forms of democracy. Now it is certainly true that the processes of election, representation, and legislation, as they actually exist in the United Kingdom, are quite imperfect by democratic standards. The executive dominates the House of Commons, leaving it weak as an independent institution; small or new parties are squeezed out by the plurality system; voters have to choose between whole packages of policies and cannot vote issue by issue; and as for deliberation, Prime Minister's Question-time and party political broadcasts on television hardly answer to the high-minded account of participation that we developed in Section 8. It is all very well to say that Parliament has a democratic

[69] I shall not waste time with the argument that since judges live in the same community as the rest of us and read the newspapers, etc, their views about rights are therefore 'informally' in tune with, and representative of, the views prevalent in the community. Even if this is true, the same might be said of any dictator who inhabits the society that she dominates.

self-image. What are we to say about the numerous ways in which the corrupt reality falls short of this ideal?

We must remember, once again, what that argument is seeking to justify—the disempowerment of ordinary citizens, on matters of the highest moral and political importance. No one ever thought that the imperfection of existing representative institutions was a justification for not enfranchising women, or that in the United States it could be an argument to continue denying political rights to Americans of African descent. If someone were to meet *those* participatory demands with an argument like the one we are currently considering, the move would be rejected immediately as an insult. The response would be:

> Imperfect though those institutions are, we want to have our say. Our voices should have as much weight in this admittedly imperfect process as those of anyone else. If there is imperfection in the process, let us amend the process. But the imperfections are not mended by keeping half the people out. (And—to tell you the truth—we think you are raising this issue of the imperfections of the process purely as a ploy to justify the denial of our legitimate participatory rights.)

Offhand, I cannot think why a similar comment would not be in order in regard to the disenfranchisement of ordinary citizens, in favour of the judiciary, on the matters that are covered by a Bill of Rights.

The other thing to note about the argument from the imperfections of democracy is that it is still not an argument in favour of judicial power. The imperfection of one institution, by democratic standards, goes no way towards justifying the imperfection of another. One cannot, for example, legitimize the power of the monarchy or the unelected second chamber by pointing to the democratic imperfections of the House of Commons (egregious though they are); for the Lords and the monarchy are even *worse* from a democratic point of view. To empower those institutions is to compound rather than mitigate the imperfections of British democracy. The same applies to the courts. Even if we agree that parliament is not the epitome of democratic decision-making, the question is whether allowing parliamentary decisions to be overridden by the courts makes matters better or worse from a democratic point of view.

Ronald Dworkin has argued that '[i]f we give up the idea that there is a canonical form of democracy, then we must also surrender the idea that judicial review is wrong because it inevitably compromises democracy'.[70] Certainly there is no canonical form of democracy—no final or transcendently given set of answers to the question of what institutions can best embody the popular aspiration to self-government. But the argument against judicial reform does not depend on our access to a democratic canon. It depends solely on the point that, *whatever you say* about your favourite democratic procedures, decision-making on matters of high importance by a small elite that disempowers the people or their elected and accountable representatives is going to score lower than decision-making by the people or their elected and accountable representatives.

[70] Dworkin, *A Matter of Principle*, 70.

It *may* score higher in terms of the substantive quality of the decision. But it will not score higher in terms of the respect accorded to ordinary citizens' moral and political capacities.

11 *Democratic Self-Restraint*

If a Bill of Rights is incorporated into British law it will be because parliament (or perhaps the people in a referendum) will have voted for incorporation. Ronald Dworkin has argued that this fact alone is sufficient to dispose of the democratic objections we have been considering. The objections, in his view, are self-defeating because polls reveal that more than 71 per cent of people believe that British democracy would be improved by the incorporation of a Bill of Rights.[71]

However, the matter cannot be disposed of so easily. For one thing, the fact that there is popular support, even overwhelming popular support, for an alteration in constitutional procedures does not show that such alteration therefore makes things more democratic. Certainly, my arguments entail that if the people want a regime of constitutional rights, then that is what they should have: democracy requires *that*. But we must not confuse the reason for carrying out a proposal with the character of the proposal itself. If the people wanted to experiment with dictatorship, principles of democracy might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic. Everyone agrees that it is possible for a democracy to vote itself out of existence; that, for the proponents of constitutional reform, is one of their great fears. My worry is that popular support for the constitutional reforms envisaged by Dworkin and other members of Charter 88 amounts to exactly that: voting democracy out of existence, at least so far as a wide range of issues of political principle is concerned.

There *is* a debate going on in Britain about these issues. Citizens are deliberating about whether to limit the powers of parliament and enhance the powers of the judiciary along the lines we have been discussing. One of the things they are considering in this debate is whether such moves will make Britain more or less democratic. This article is intended as a contribution to that debate: I have offered grounds for thinking that this reform will make Britain less of a democracy. What the participants in that debate do *not* need to be told is that constitutional reform will make Britain more democratic if they think it does. For they are trying to work out *what to think* on precisely that issue.

Dworkin also suggests that the democratic argument against a Bill of Rights is self-defeating in a British context, 'because a majority of British people themselves rejects the crude statistical view of democracy on which the argument is based'.[72] But although democracy connotes the idea of popular voting, it is not

[71] Dworkin, *A Bill of Rights for Britain*, op cit, 36–7.
[72] Ibid, 36.

part of the concept of democracy that its own content be fixed by popular voting. If a majority of the British people thought a military dictatorship was democratic (because more in tune with the 'true spirit of the people' or whatever), that would not show that it was, nor would it provide grounds for saying that democratic arguments against the dictatorship were 'self-defeating'. If Dworkin wants to make a case against 'the crude statistical view' as a conception of democracy, he must argue for it: that is, he must *show* that a system in which millions of votes cast by ordinary people are actually *counted*, and actually *count* for something when decisions are being made against a background of disagreement, is a worse conception of the values set out in section 8 than a model in which votes count only when they accord with a particular theory of what citizens owe one another in the way of equal concern and respect.

However, Dworkin's comments do point the way to what is perhaps a more sophisticated answer to the democratic objection. We are familiar in personal ethics with the idea of 'pre-commitment'—the idea that an individual may have reason to impose on herself certain constraints so far as her future decision-making is concerned. Ulysses, for example, decided that he should be bound to the mast in order to resist the charms of the sirens, and he instructed his crew that 'if I beg you to release me, you must tighten and add to my bonds'.[73] Similarly, a smoker trying to quit may hide her own cigarettes, and a heavy drinker may give her car keys to a friend at the beginning of a party with strict instructions not to return them when they are requested at midnight. These forms of pre-commitment strike us as the epitome of self-governance rather than as a derogation from that ideal. So, similarly, it may be said, an electorate could decide collectively to bind itself in advance to resist the siren charms of rights-violations in the future. Aware, as much as the smoker or the drinker, of the temptations of wrong or irrational action under pressure, the people of a society might in a lucid moment put themselves under certain constitutional disabilities—disabilities which serve the same function in relation to democratic values as strategies like hiding the cigarettes or handing the car keys to a friend serve in relation to the smoker's or the drinker's autonomy.[74]

The analogy is an interesting one, but it is not ultimately persuasive. In the cases of individual pre-commitment, the person is imagined to be quite certain, in her lucid moments, about the actions she wants to avoid and the basis of their undesirability. The smoker knows that smoking is damaging her health and she can give a clear explanation in terms of the pathology of addiction of why she still craves a smoke notwithstanding her possession of that knowledge. The drinker knows at the beginning of the evening that her judgment at midnight about her own ability to drive safely will be seriously impaired. But the case *we* are dealing with is that of a society whose members disagree, even in their 'lucid' moments, about what rights they have, how they are to be conceived, and what weight they

[73] Quoted in Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984), 36.

[74] I am grateful to Eric Rakowski for these analogies.

are to be given in relation to other values. They need not appeal to aberrations in rationality to explain these disagreements; they are, as we have seen, sufficiently explained by the subject-matter itself. A pre-commitment in these circumstances, then, is not the triumph of pre-emptive rationality that it appears to be in the smoker's or in the drinker's case. It is rather the artificially sustained ascendancy of one view in the polity over other views whilst the philosophical issue between them remains unresolved.

A better individual analogy (than the case of the drinker or the smoker) might be the following. A person who is torn between competing religious beliefs opts decisively one day for the faith of a particular sect. She commits herself utterly to that religion and she abjures forever the private library of theological books in her house that had excited her uncertainty in the past. Indeed she locks the library and gives the keys to a friend with instructions never to return them, not even on demand. But the doubts in her own mind never go away ('Maybe Tillich was right after all . . .'), and a few months later she asks for the keys. Should the friend return them? It is clear, I think, for a number of reasons, that this is quite a different case from withholding the car keys from the drunk driver. Both involve forms of pre-commitment. But in the theological case, for the friend to sustain the pre-commitment would be, as it were, for her to take sides in a dispute between two or more conflicting selves (or two or more conflicting aspects of the self) of the agent in question, in a way that is simply not determined by any recognizable criteria of pathology or other mental aberration. To uphold the pre-commitment is to sustain the temporary ascendancy of one self (or one aspect of the self) at the time the library keys were given away, and to neglect the fact that the self that demands them back has an equal claim to respect for *its* way of dealing with the vicissitudes of theological uncertainty.[75]

Upholding another's pre-commitment may be regarded as a way of respecting her autonomy only if a clear line can be drawn between the aberrant mental phenomena the pre-commitment was supposed to override, on the one hand, and genuine uncertainty, changes of mind, conversions, etc, on the other hand. In the drunk driver case, we can draw such a line; in the theological case, we have much more difficulty, and that is why respecting the pre-commitment seems like taking sides in an internal dispute between two factions warring on roughly equal terms.

Clearly there are dangers in *any* simplistic analogy between the rational autonomy of individuals and the democratic governance of a community. The idea of a society binding itself against certain legislative acts in the future is particularly problematic in cases where the members of that society disagree with one another about the need for such bonds, or if they agree abstractly about the need, disagree about their content or character. It is particularly problematic where such disagreements can be expected to persist and to develop and change in unpredictable ways. If, moreover, the best explanation of these persisting disagreements is that the issues the society is addressing are just *very difficult*

[75] For an excellent discussion, see Thomas C. Schelling, *Choice and Consequences: Perspectives of an Errant Economist* (Cambridge: Harvard University Press, 1984), ch 4. I am grateful to Carol Price for this reference.

issues, then we have no justification whatever for regarding the temporary ascendancy of one or other party to the disagreement as an instance of full and rational pre-commitment on the part of the entire society. In these circumstances, the logic of pre-commitment must simply be put aside, and we must leave the members of the society to work out their differences and to change their minds in collective decision-making over time, the best way they can.

13 *Conclusion*

It is odd that people expect theorists of rights to support the institutionalization of a Bill of Rights and the introduction of American-style practices of judicial review. All modern theories of rights claim to respect the capacity of ordinary men and women to govern their own lives on terms that respect the equal capacities of others. It is on this basis that we argue for things like freedom of worship, the right to life and liberty, free speech, freedom of contract, the right to property, freedom of emigration, privacy and reproductive freedoms. It would be curious if nothing followed from these underlying ideas so far as the governance of the community was concerned. Most theories of rights commit themselves also to democratic rights: the right to participate in the political process through voting, speech, activism, party association, and candidacy. I have argued that these rights are in danger of being abrogated by the sort of proposals put forward by members of Charter 88 in the United Kingdom.

The matter is one of great importance. People fought long and hard for the vote and for democratic representation. They wanted the right to govern themselves, not just on mundane issues of policy, but also on high matters of principle. They rejected the Platonic view that the people are incapable of thinking through issues of justice. Consider the struggles there have been, in Britain, Europe and America—first for the abolition of property qualifications, secondly for the extension of the franchise to women, and thirdly, for bringing the legacy of civil rights denials to an end in the context of American racism. In all those struggles, people have paid tribute to the democratic aspiration to self-governance, without any sense at all that it should confine itself to the interstitial quibbles of policy that remain to be settled after some lawyerly elite have decided the main issues of principle.

These thoughts, I have argued, are reinforced when we consider how much room there is for honest and good faith disagreement among citizens on the topic of rights. Things might be different if principles of right were self-evident or if there were a philosophical elite who could be trusted to work out once and for all what rights we have and how they are to be balanced against other considerations. But the consensus of the philosophers is that these matters are not settled, that they are complex and controversial, and that certainly in the seminar room the existence of good faith disagreement is undeniable. Since that is so, it seems to me obvious that we should view the disagreements about rights that exist among citizens in exactly the same light, unless there is compelling evidence to

the contrary. It is no doubt possible that a citizen or an elected politician who disagrees with my view of rights is motivated purely by self-interest. But it is somewhat uncomfortable to recognize that she probably entertains exactly the same thought about me. Since the issue of rights before us remains controversial, there seems no better reason to adopt my view of rights as definitive and dismiss her opposition as self-interested, than to regard me as the selfish opponent and her as the defender of principle.

Of course such issues have got to be settled. If I say P has a right to X and my opponent disagrees, some process has got to be implemented to determine whether P is to get X or not. P and people like her cannot be left waiting for our disagreements to resolve themselves. One of us at least will be dissatisfied by the answer that the process comes up with, and it is possible that the answer may be wrong. But the existence of that possibility—which is, as we have seen, an important truth about all human authority—should not be used, as it is so often, exclusively to discredit the democratic process. There is always something bad about the denial of one's rights. But there is nothing specially bad about the denial of rights at the hands of a majority of one's fellow citizens.

In the end, I think, the matter comes down to this. If a process is democratic and comes up with the correct result, it does no injustice to anyone. But if the process is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does *this* injustice, tyrannizes in *this* way, whether it comes up with the correct result or not.

One of my aims in all this has been to 'dis-aggregate' our concepts of democracy and majority rule. Instead of talking in grey and abstract terms about democracy, we should focus our attention on the individuals—the millions of men and women—who claim a right to a say, on equal terms, in the processes by which they are governed. Instead of talking impersonally about 'the counter-majoritarian difficulty', we should distinguish between a court's deciding things by a majority, and lots and lots of ordinary men and women deciding things by a majority. If we do this, we will see that the question 'Who gets to participate?' always has priority over the question 'How do they decide, when they disagree?'.

Above all, when we think about taking certain issues away from the people and entrusting them to the courts, we should adopt the same individualist focus that we use for thinking about any other issue of rights. Someone concerned about rights does not see social issues in impersonal terms: she does not talk about 'the problem of torture' or 'the problem of censorship' but about the predicament of each and every individual who may be tortured or silenced by the State. Similarly, we should think not about 'the people' or 'the majority', as some sort of blurred quantitative mass, but of the individual citizens, considered one by one, who make up the polity in question.

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should try and think what we might say to some public-spirited citizen who wishes to launch a

campaign or lobby her MP on some issue of rights about which she feels strongly and on which she has done her best to arrive at a considered and impartial view. She is not asking to be a dictator; she perfectly accepts that her voice should have no more power than that of anyone else who is prepared to participate in politics. But—like her suffragette forebears—she wants a vote; she wants her voice and her activity to count on matters of high political importance.

In defending a Bill of Rights, we have to imagine ourselves saying to her: 'You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' view. When their votes differ from yours, theirs are the votes that will prevail.' It is my submission that saying this does not comport with the respect and honour normally accorded to ordinary men and women in the context of a theory of rights.