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A Right-Based Critique of Constitutional Rights

Jeremy Waldron

1 Introduction

... 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, 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"....

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.

Excerpted from: Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993): 18-51. Reprinted by permission of Oxford University Press.

4. John Stuart Mill, *On Liberty*, ch 1, para 15 (Indianapolis: Bobbs-Merrill, 1955), 18.

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 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

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I Introduction

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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? ...

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

30. Wesley N. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1923).

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.

If, on the other hand, the desire for entrenchment is motivated by a predatory view of human

31. See Aristotle, *Politics*, Bk I, ch 2, 1253a1-18 (3).

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 responsibility. 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

... 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 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. ...

10 Imperfect Democracy

... [T]he 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

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.

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

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.

cratic 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 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

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 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 incapable. 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 too 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 *demo-*

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.)

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 ... 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. ...

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 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

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, *here* 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. ...

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

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

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.

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 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 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 defining 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 “if [if] 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. 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 percent 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

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

71. Dworkin, *A Bill of Rights for Britain*, 36–37.

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 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

72. *Ibid.*, 36.

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

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

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 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....

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 inter-

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

nal 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 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 lawfully 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.