

The Constitutional Conception of Democracy

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1. Democratic Rights

The idea of democracy is not incompatible with the idea of individual rights. On the contrary, there cannot be a democracy unless individuals possess and regularly exercise what we called in [Chapter Eleven of *Law and Disagreement*, from which the present chapter in this volume is taken] 'the right of rights' - the right to participate in the making of the laws. Not only that but, [as I argued at the end of Chapter Ten], there is a natural congruence between rights and democracy. The identification of someone as a right-bearer expresses a measure of confidence in that person's moral capacities - in particular his capacity to think responsibly about the moral relation between his interests and the interests of others. The possession of this capacity - a sense of justice, if you like! - is the primary basis of democratic competence. Our conviction, that ordinary men and women have what it takes to participate responsibly in the government of their society is, in fact, the same conviction as that on which the attribution of rights is based.

[In Chapters Ten and Eleven), I invoked this connection in order to embarrass theorists of rights who professed apprehensions about or indifference towards the ideal of democratic decision-making. But the congruence between rights and democracy is a two-way street. A theorist of rights should not be in the business of portraying the ordinary members of a democratic majority as selfish and irresponsible predators. But equally a theorist of democracy should not affect a pure proceduralist's nonchalance about the fate of individual rights under a system of majority-decision, for many of these rights (even those not directly implicated in the democratic ideal) are based on the respect for individual moral agency that democracy itself involves.

Constitutional theorists like Ronald Dworkin are therefore quite correct when they say we are not entitled to appeal to any fundamental opposition between the idea of democracy and the idea of individual rights as a basis for criticizing a practice like American-style judicial review of legislation. There is no such fundamental opposition. If there is a democratic objection to judicial review, it must also be a rights-based objection. And that objection cannot be sustained unless we are prepared to answer some hard questions about how rights are supposed to be protected in a system of democratic decision-making.

The rights I want to emphasize in this chapter fall into two main categories: (a) rights that are actually constitutive of the democratic process, and (b) rights which, even if they are not formally constitutive of democracy nevertheless embody conditions necessary for its legitimacy.

Consider first the rights required for the constitution of a democracy. (a). Theorists disagree about whether democracy is anything more than: procedural ideal,² but certainly it is at least the idea of a political procedure constituted in part by certain rights. Democracy requires that when there is disagreement in a society about a matter on which a common decision is needed, every man and woman in the society has the right to participate on equal terms in the resolution of that disagreement. The processes that this involves may be complex and indirect; there may be convoluted structures of election and representation. But they are all oriented in the end toward the same ideal: participation by the people - somehow, through some mechanism - on basically equal terms. This means that there cannot be democracy unless the right to participate is upheld, and unless the complex rules of the representative political process are governed, fundamentally, by that right. If some are excluded from the process, or if the process itself is unequal or inadequate, then both rights and democracy are compromised.

A second set of rights - (b) - we have to consider takes us beyond issues of formal procedure. Apart from those that constitute the democratic process, there are many rights that may plausibly be represented as conditions for the legitimacy or moral respectability of democratic decision making. No one thinks that any old bunch of people is entitled to impose a decision on others, simply on the ground that there are more individuals in favour of the decision than against it. Democracy and majority-decision make moral sense only under certain conditions. The most obvious of these conditions are free speech and freedom of association - rights which establish a broader deliberative context in civil society for formal political decision-making. But I have in mind also claims about rights that have little or no procedural aspect. In *Freedom's Law*, Dworkin argues that a person not bound by the decisions of a democracy unless he is in some satisfactorily substantive sense a member of the community whose democracy it is. Membership is not just a matter of formal participation: it is also a matter of a person's interests being treated with appropriate concern. Even if he has a vote, he can hardly be expected to accept majority decisions as legitimate if he knows that other members of the community do not take his interests seriously or if the established institutions of the community evince contempt or indifference towards him or his kind (25).³ And Dworkin makes a similar case for the importance of the community respecting the moral independence of its members. He thinks I cannot be a member of a community, in the suitably robust sense that generates legitimacy and political obligation, unless I can reconcile my membership with self-respect; and I can do that only if the community does not purport to dictate my fundamental ethical convictions (25-6).

I am not sure whether we should accept this last argument of Dworkin's. But no doubt some arguments work along these lines. There are surely some rights such that, if they were not respected in a community, no political legitimacy could possibly be accorded to any majoritarian decision-procedure. Is it not appropriate, then, for majority decision-making to be constrained by rights which satisfy this formula? One could hardly complain about such constraints in the name of democracy, for a democracy unconstrained by such rights would be scarcely worthy of the name. Such an objection would be directed against the establishment or protection of the very conditions that made democracy an ideal worth appealing to.

The relation between democracy and the conditions of its legitimacy may be represented as a relation between rights: that is, the rights under class (a) presuppose the rights under class (b). Sometimes when we talk about one set of rights presupposing another, it is because we think the rights in the second set are preconditions for the meaningful or effective exercise of the first. Thus, Henry Shue argues that the meaningful exercise of any right presupposes that the right-bearers have rights to subsistence and security and that these latter rights have been satisfied.⁴ No doubt this applies to political rights as well: one cannot meaningfully exercise the right to vote in conditions of terror or starvation. But the relation I discussed in the previous paragraph is slightly different. It represents one set of rights as the conditions of the legitimate exercise of another. (It is a bit like saying that the right to sell an object presupposes that the seller owns the object.) Legitimacy is an issue because the exercise of participatory rights is not just a matter of freedom. When one votes, one exercises a Hohfeldian powers which (together with the exercise of that power by enough others) may alter the legal position of certain other people, perhaps against their wishes, perhaps to their disadvantage. Having this impact on others is permissible only under certain conditions, and those conditions may be represented as rights held 1 anyone who is liable to be subject to such impact.

Rights in classes (a) and (b) I shall call 'rights associated with democracy'. In a broader sense all rights are associated with democracy because as I said at the beginning of this section, all rights require the same sort of respect for individuals which democracy also requires. Many theorists have sought to confine their argument for constitutional rights to those rights that are related directly or indirectly to the democratic process.⁶ They imagine - wrongly, as we shall see - that no democratic objection can be sustained against right-based constraints concerned with the procedural integrity of democracy. And they believe - again, I think, wrongly - that the concerns a democrat ought to have about rights do not apply to what they call

'substantive rights' unrelated to the democratic process. In fact the right-based argument for democracy cannot be separated off from other rights in this way. Based as it is on respect for persons as moral agents and moral reasoners, the premises of that argument will certainly yield substantive conclusions about what people are entitled to so far as personal freedom is concerned and it may well yield conclusions about affirmative entitlements in the realm of social and economic well-being. Sure, some of these conclusions are also related to the democratic process as constitutive elements or as conditions of its legitimacy. But the premises of the right-based case for democracy may provide a direct argument for substantive rights that bypasses the case for democracy. These rights, then, are associated with democracy not in the sense of being constitutive of it or presupposed by it, but in the sense of being other conclusions of the very premises that ground the rights-based case for democracy.

For most of this chapter, however, I shall confine my attention to class (a) and (b). Rights in class (a) have been the focus of a well-known argument by John Hart Ely to the effect that no democratic objection can be sustained against judicial review to vindicate rights that are procedurally constitutive of democracy.⁷ Dworkin thinks Ely is wrong to confine his attention to class (a), however, and I agree with him on that.⁸ The argument I want to examine in the body of the chapter deals with both categories. Then, towards the very end, in sections 11 and 12, I shall return to the broader issue of democratic protection for rights in general.

2. Does Judicial Review Improve Democracy?

In the United States and in the United Kingdom, Ronald Dworkin has been a firm defender of the compatibility of democracy with constitutional rights and judicial review.⁹ His recent book, *Freedom's Law* articulates a new version of that defence. Dworkin believes it is no accident that new democracies -- in South Africa, for example, or in Central and Eastern Europe -- turn almost instinctively to some version of the constitutional arrangements we are considering. They do so, he thinks, not because they are nervous or ambivalent about democracy, but because a system combining popular legislation, constitutional guarantees, and judicial review seems like the form of democracy that, in their circumstances, will offer the best assurance that the rights associated with democracy will continue to be respected. America chose a particularly attractive form of democracy at its birth, Dworkin argues (70-1). Its Founding Fathers invented the idea that the very constitution of a country --- the document that establishes, empowers, and shapes the structures of government-- should also be the guarantor of human rights.¹⁰ This idea that government should be bound to the rights associated with democracy by the very authority that structures and empowers its democratic procedures is in Dworkin's view 'the most important contribution our [i.e. United States] history has given to political theory' (6). It would be a 'historic shame', he says, if Americans were to lose faith in this practice just as it is beginning to inspire the world (71).

In *Freedom's Law*, Dworkin does not merely defend the familiar claim that judicial review on the basis of constitutional principle makes a society more just than it would be without it. Sure, he does accept that familiar claim (at least so far as the United States is concerned), and he has defended it elsewhere.¹¹ The challenging thing about the *Freedom's Law* position is that Dworkin actually insists, without any qualification, that '[a] constitution of principle, enforced by independent judges, is not undemocratic' (123). There is no trade-off between rights and democracy, he insists. Instead he thinks that the practice of allowing a handful of unelected and unaccountable judges to strike down laws passed by a representative legislature helps constitute a distinctive and excellent form of democracy in the United States (15). What's more, his reason for believing this remarkable claim is no longer the reason we criticized at the beginning of Chapter Twelve -- namely, that the practice is something the American people have chosen. ¹² He now maintains that whoever chose it chose an option favourable to democracy.

In one or two places Dworkin goes beyond this, and gives the impression that he thinks a political system which allows ordinary majorities to make decisions about rights should not be regarded as genuinely democratic. He says any version of democracy that requires 'deference to temporary majorities on matters of individual right is . . . brutal and alien, and many other nations with firm democratic traditions now reject it as fake' (71). Mostly, however, his position is less strident than that. The argument I will criticize in this chapter is the argument intended to show that American style constitutional arrangements are no less democratic on account of judicial review, not the argument that judicial review is actually required by democracy. In his most careful formulation, Dworkin says:

"I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these various arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does not insist that they must not have it." (7)

So, although Ronald Dworkin is among those who urge the introduction of American-style arrangements into the United Kingdom, I do not think he really wants to say that the Westminster system as it stands is basically undemocratic or less democratic because it lacks a system of judicial review. Mostly what he wants to say is that if judicial review were introduced, Britain would be no less democratic in consequence. That's what I want to consider in this chapter: I want to ask one more time, in the light of Dworkin's arguments, whether there is in fact a loss to democracy when an elected legislature of a society is subjected to judicial power. Dworkin thinks there is not. I shall try to show that this is not established by the arguments in *Freedom's Law*.

3. Judicial Review and Justice

I want to begin this discussion with a word about the more familiar idea I mentioned - namely, that judicial review may make a society more just (whether or not it is compatible with democracy). As I said, Dworkin buys this too, certainly as far as America is concerned. 'The United States he says, 'is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions.'¹³

Should we accept this as a starting point? I have my doubts. Like any claim involving a counterfactual ('more just than it would have been if. . .'), it is an extraordinarily difficult proposition to assess. As we consider it, we think naturally of landmark decisions like *Brown v. Board of Education*,¹⁴ and the impact of such decisions on desegregation and the promotion of racial equality. But it is not enough to celebrate Brown. Verifying the counterfactual would involve not only an assessment of the impact of that and similar decisions but also a consideration of the way in which the struggle against segregation and similar injustices might have proceeded in the United States if there had been no Bill of Rights or no practice of judicial review.¹⁵ About the only evidence we have in this regard is the struggle against injustice in other societies which lacked these institutions. Many such societies seem to be at least as free and as just as the United States,¹⁶ though of course it is arguable such comparisons underestimate the peculiarities of American politics and society. In addition, a proper assessment of the claim would require us to consider the injustice that judicial review has caused as well as the injustice it has prevented. It would require us to consider, for example, the injustice occasioned by the striking down by state and federal courts of some 150 pieces of legislation concerning labour relations and labour conditions in the period (now referred to as the *Lochner* era) from 1885 to 1930.¹⁷ Not only that, but it would also require us to consider the longer term effects of the discrediting of parliamentary socialism within the American labour movement that resulted from repeated judicial obstruction of otherwise successful legislative initiatives.¹⁸ One would have to balance all that against the good that the courts have done. Dworkin is aware that the record on

judicial review is far from perfect, and he has very little positive to say about the jurisprudence of the Lochner era. I cannot help feeling however that he underestimates the damage done in this period when he says that '[i]n fact, the most serious mistakes the Supreme Court has made, over its history, have been not in striking down laws it ought to have upheld, but in upholding laws it ought to have struck down'(388).¹⁹

The claim about justice may in the end be impossible to verify. And even were it true, it would still involve a problematic trade-off between justice and democratic ideals, unless the more ambitious claim of *Freedom's Law* could be sustained. For Dworkin acknowledges that democracy would be eroded if we were to give a bunch of unelected philosopher-kings the power to overrule legislation simply on the ground that they thought it unjust: 'Even if the experts always improved the legislation they rejected-- always stipulated fairer income taxes than the legislature had enacted, for example -- there would be a loss in self-government which the merits of their decision could not extinguish' (32). To reach the distinctive conclusions of *Freedom's Law*, Dworkin must therefore show that in some circumstances judicial review of legislation does not detract at all from, and maybe even enhances, the democratic character of the political system of which it is a part.

4. Improving Public Debate

One way he tries to show this is by considering the effect of constitutional adjudication on the character of public debate. Modern civic republicans and participatory democrats emphasize the importance of citizens engaging actively in political deliberation, and some of them have misgivings about judicial review because they think it tends to undermine this engagement by removing important decisions of principle from the democratic forum. Dworkin believes, however, that the quality of public debate may actually be better on this account:

“When an issue is seen as constitutional, . . . and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates from the start on questions of political morality. . . . When a constitutional issue has been decided by the Supreme Court, and is important enough so that it can be expected to be elaborated, expanded, contracted, or even reversed by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables. That debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce. (345)”

He cites as an example the great debate about abortion surrounding the Supreme Court's decision in *Roe v. Wade*,²⁰ saying it has involved many more people and has led to a more subtle appreciation of the complexities involved than in other countries where the final decision about abortion: was assigned to elected legislatures. As a result of entrusting it to the courts:

“Americans better understand, for instance, the distinction between the question whether abortion is morally and ethically permissible, on the one hand, and the question whether government has the right to prohibit it, on the other; they also better understand the more general and constitutionally crucial idea on which that distinction rests: that individuals have rights that may work against the general will or the collective interest or good. (345)”

In this way, Dworkin thinks, a system of final decision by judges on certain great issues of principle may actually enhance the participatory character of our politics.²¹

I am afraid I do not agree with any of this. Consider first what is said about political discussion. Dworkin acknowledges that he is making tentative empirical claims about the quality of public debate. My experience is that national debates about abortion are as robust and well-informed in countries like the United Kingdom and New Zealand, where they are not constitutionalized, as they are in the United States - the more so perhaps because they are uncontaminated by quibbling about how to interpret the text of an eighteenth century document. It is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of the scraps of some sacred text, in a tendentious exercise of constitutional calligraphy. Think of how much more wisely capital punishment has been discussed (and disposed of) in countries where the debate has not had to centre around the moral reading of the phrase 'cruel and unusual punishment', but could focus instead on broader aims of penal policy and on dangers more morally pressing than 'unusualness', such as the execution of the innocent.²² It is simply a myth that the public requires a moral debate to be, first of all, an interpretive debate before it can be conducted with any dignity or sophistication.

Or consider the debate about homosexual law reform initiated by the 1957 Wolfenden Report in Great Britain,²³ and sustained in the famous exchange between Lord Devlin and H. L. A. Hart in the 1960s.²⁴ Despite their focus on the decisions of a legislature (the British Parliament), these authors seemed to evince a perfectly adequate grasp of the distinction between whether something is morally permissible and whether government has the right to prohibit it. They did not need to be taught that by a court. Indeed, if the US Supreme Court's intervention on a similar issue is anything to go by, the American debate is actually impoverished by its constitutionalization. As Mary Ann Glendon has remarked, the decision in *Bowers v. Hardwick*²⁵ is remarkable for the 'lack of depth and seriousness of the analysis contained in its majority and dissenting opinions', compared with the discussion that has taken place in other countries.²⁶ If the debate that actually takes place in American society and American legislatures is as good as that in other countries, it is so despite the Supreme Court's framing of the issues, not because of it.

Still, suppose Dworkin is right that the quality of public discussion may be improved by citizens' awareness that the final disposition of some issue of principle is to be taken out of the hands of their elected representatives and assigned instead to a court. The idea that civic republicans and participatory democrats should count this as a gain is a travesty. Civic republicans and participatory democrats are interested in practical political deliberation, which is not just any old debating exercise, but a form of discussion among those who are about to participate in a binding collective decision. A star-struck people may speculate about what the Supreme Court will do next on abortion or some similar issue; they may even amuse each other, as we law professors do, with stories of how we would decide, in the unlikely event that we were elevated to that eminent tribunal. The exercise of power by a few black-robed celebrities can certainly be expected to fascinate an articulate population. But that is hardly the essence of active citizenship. Perhaps such impotent debating is nevertheless morally improving: Dworkin may be right that 'there is no necessary connection between a citizen's political impact or influence and the ethical benefit he secures through participating in public discussion' (30). But independent ethical benefits of this kind are at best desirable side effects, not the primary point of civic participation in republican political theory.

5. Democratic Ends and Democratic Means

As I said, Dworkin acknowledges the tentativeness of his response to the civic republicans. His main argument for the claim that judicial review involves no cost in terms of democracy is somewhat different. It goes as follows.

Suppose a piece of legislation is enacted by an elected assembly and then challenged by a citizen on the ground that it undermines one of the rights associated with democracy. (The example Dworkin gives (32)

is a statute prohibiting flag-burning.) And suppose the issue is assigned to a court for decision, and the court strikes down the statute, accepting the citizen's challenge. Is there a loss to democracy? The answer, Dworkin says, depends entirely on whether the court makes the right decision. If it does-- that is, if the statute really was incompatible with the rights required for a democracy- ~ then democracy is surely improved by what the court has done. For the community is now more democratic than it would have been if the anti-democratic statute had been allowed to stand. Of course, Dworkin adds,

"if we assume the court's decision was wrong, then none of this is true. Certainly it impairs democracy when an authoritative court makes the wrong decision about what the democratic conditions require-- but no more than it does when a majoritarian legislature makes a wrong constitutional decision that is allowed to stand. The possibility of error is symmetrical." (32~3)

It follows, says Dworkin, that democratic constitutional theory ought to be oriented primarily to results (34). In every society, there will be questions whether enacted legislation conflicts with the fundamental principles of democracy. These questions should be assigned to whatever institution is likely to answer them correctly. In some countries, for all we know, this may be the legislature. But often there is reason to think the legislature is not the safest vehicle for protecting the rights associated with democracy (34). In that case, we should assign the issue to the courts, if we think they are a safer bet. We should not be deterred, says Dworkin, by the fact that courts are not constituted in a way that makes them democratically accountable. Accountability does not matter, he says. The crucial thing is that courts are reliable at making good decisions about democracy. That is all a partisan of democracy should care about.

That is the argument. Notice how it turns on an elision between a decision about democracy and a decision made by democratic means. Dworkin seems to be suggesting that if a political decision is about democracy, or about the rights associated with democracy, then there is no interesting or interestingly distinct question to be raised about the way in which (i.e., the institutional process by which) the decision is made. All that matters is that the decision be right, from a democratic point of view. In the case of social justice, that is not so: the right decision about social justice may have been reached, but -- as Dworkin concedes (32) -- it still matters whether it was reached democratically. In the case of a decision about democracy, however, he thinks the distinction collapses.

I wonder whether, on reflection, Dworkin really means to collapse content and legitimacy in this way. Suppose the United Kingdom became embroiled in a debate about the democratic merits of proportional representation (PR), and that in a moment of national exasperation with the inability of elected politicians to resolve this issue, the Queen were to announce that henceforth the electoral system would be organized on the basis of 'Single Transferable Vote'. Suppose also, for the sake of argument, that the Queen's decision was the right one: that the version of PR she chose really does make an electoral system more democratic than the old-fashioned 'first-past-the-post' system. Could this possibly be regarded as an exercise of democratic power on the ground that it confined itself to a question about the nature of the democratic process and answered that question correctly? In New Zealand a few years ago, the issue which we are imagining being settled in Britain by the Queen was settled in fact by two popular referendums, separated by a year or so of public education and careful debate. Is it really Dworkin's position that the Queen's intervention (in our imagined example) would be no less democratic a way of settling this issue than the popular referendums in New Zealand? Should we not rather say -- would it not be much clearer to say -- that in the imaginary British case a democratic issue was settled undemocratically? And that there was therefore a loss in self-government, even though the Queen got the answer right?

Of course there is an additional difference: we are imagining the Queen intervening in a sort of unconstitutional putsch. A system of judicial review would presumably not have that character.²⁷ Actually

that's not quite true: at the birth of judicial review in the United States, some jurists did regard it as constitutionally irregular; and certainly, if it were introduced into the UK, various English pedants could be relied on to make the point that any abrogation of parliamentary sovereignty was both unconstitutional and illogical. Anyway, whether something is constitutionally irregular is a separate question from whether it is undemocratic (though sometimes the latter is a ground for the former). If someone were to ask (in our hypothetical case) why the Queen's intervention was an important as opposed to a trivial irregularity, we would surely say that it was important because it compromised democracy, because she had usurped a decision that should properly have been taken by the people or their representatives. And that's the point I want to make: concerns about the democratic or non-democratic character of a political procedure do not evaporate when the procedure in question is being used to address an issue about the nature of democracy.

The same argument may be put more concisely. If a question comes up for political decision in a community, a member of the community might reasonably ask to participate in it on equal terms with his fellow citizens. Now there may be all sorts of reasons for denying his request, but it would surely be absurd to deny it on the ground that the question was one about democracy. That would be absurd because it would fail to address his concern that a question about democracy, as much as any political question, should be settled by democratic means.

So I do not think we should accept Dworkin's claim to have created 'a level playing field on which the contest between different institutional structures for interpreting the democratic conditions must take place' (33). The playing field is not level. There is something lost, from democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires. If it makes the right decision, then - sure- there is something democratic to set against that loss; but that is not the same as there being no loss in the first place. On the other hand, if an institution which is elected and accountable makes the wrong decision about what democracy requires, then although there is a loss to democracy in the substance of the decision, it is not silly for citizens to comfort themselves with the thought that at least they made their own mistake about democracy rather than having someone else's mistake foisted upon them. Process may not be all that there is to democratic decision-making; but we should not say that, since the decision is about democracy, process is therefore irrelevant.

6. Disagreement, Again

Dworkin acknowledges that reasonable citizens may disagree about what democracy requires and about the rights that it involves or presupposes.²⁸ They disagree about details like the voting age, electoral laws, and campaign finance. And they disagree also about some of the fundamentals: the basis of representation and the connection between political and social equality. They certainly disagree about what democracy presupposes as conditions of legitimacy. For example: What are the issues on which we require a common decision? How much concern must different sections of the community have for one another, before minorities may reasonably be expected to trust the majority? How much moral independence for its members does an attractive conception of community presuppose? Even if they agree that democracy implicates certain rights, citizens will surely disagree what these rights are and what in detail they commit us to.

The persistence of these disagreements makes a difference to the way we are able to proceed in constitutional design. The suggestion in *Freedom's Law* is that we should use a results-driven criterion for choosing the institutions to which decisions about democratic rights should be entrusted:

"I see no alternative but to use a result-driven rather than a procedure-driven standard. . . . The best institutional structure is the one best calculated to produce the best answers to the essentially moral

question of what the democratic conditions actually are, and to secure stable compliance with those conditions.” [34]

But a citizenry who disagree about what would count as the right results are not in a position to construct their constitution on this basis. (That is why John Rawls's approach to constitutional design, in *A Theory of Justice*, is so misconceived.) Using a result-driven approach, different citizens will attempt to design the constitution on a different basis. A libertarian will seek participatory procedures that maximize the prospect of legislation that is just by his own free market standards, while a social democrat will seek participatory procedures that maximize the prospects for legislation embodying collective and egalitarian concern. How can they together design a political framework to structure and accommodate the political and ideological differences between them? The only way they can do that is if they have managed already to adopt a view that can stand in the name of them all about the results they should be aiming at. But if they have managed that, from a baseline of disagreement, they must have been in possession of decision-procedures that enable them to get to that result. And presumably their possession of those decision-procedures can be explained only on the basis of their use of something other than a results-driven test (for choosing procedures) in the past.

We seem, then, to be in a bind. It looks as though it is disagreement all the way down, so far as constitutional choice is concerned. On the one hand, we cannot use a results-driven test, because we disagree about which results should count in favour of and which against a given decision-procedure. On the other hand, it seems we cannot appeal to any procedural criterion either, since procedural questions are at the very nub of the disagreements we are talking about.

7. The Capacity to Think Procedurally

Someone may say, 'Well, what did you expect? Even if we buy the view that right-based respect for persons is also respect for their sense of justice and thus respect for their political capacity, it does not follow that the people are to be entrusted with procedural questions of constitutional design. Ordinary political competence cannot be expected to extend to the building and care of the framework within which ordinary political competence is to be exercised.' Something along these lines is at back of what I perceive as the very considerable popularity of the John Hart Ely view mentioned earlier: namely, that even if there is an affront to democracy when substantive issues are taken away from the people, there is no affront when procedural issues are taken away.²⁹

But that will not do. I said earlier that there is a theoretical connection between respect for people's rights and respect for their capacities as political participators. Now there is no reason to suppose that the moral capacities respected in the idea of rights are only capacities to think substantively, as opposed to capacities to think reflectively about procedures. On the contrary, the emergence of rights-theories in the modern era was associated not just with the substantive self-confidence of individual reason, but also with a certain epistemological self-confidence, that is, a confidence on the part of individuals in their ability to reflect systematically on the procedures that knowledge and rational deliberation involved.³⁰

Whether in the form of Descartes's self-imposed strictures of method in the *Discourse on the Method*, or in John Locke's patient enquiry in the *Essay* into 'what objects our understandings were, or were not, fitted to deal with',³¹ enlightenment optimism on behalf of the individual mind was optimism at least as much in regard to its reflections upon methodology as in regard to its achievements of substance. This optimism was mirrored, in early modern political philosophy, in the assumption that the one decision that did have to be made by the people - deliberating and voting together, unaided by authority or tradition-- was the choice of a political procedure for the civil society they were inventing.³² Government might not end up being democratic; some theorists, like Hobbes, advised strongly against democracy.³³ But they had no

doubt that the choice of a constitution ~ and thus the pondering of the very issues about what different political processes involved or presupposed-- was one that could only be made by the people.³⁴

So, working in this tradition of political thought, we will not get very far with any argument that limits the competence of popular self-government to issues of substance and stops it short at the threshold of political procedure, assigning questions about forms of government to a body of a different sort altogether. Democracy is in part about democracy: one of the first things on which the people demand a voice about, and concerning which they claim a competence, is the procedural character of their own political arrangements.

8. Judges in our Own Case?

Still, the problem we face may not be one of capacity. We have to consider the suggestion - implicit in Dworkin's argument- that allowing the majority to decide upon the conditions under which majority-decisions are to be accepted may be objectionable because it makes them judge in their own case. Those who invoke the principle of *nemo iudex in sua causa* in this context say that it requires that a final decision about rights should not be left in the hands of the people: it should be passed on to an independent and impartial institution such as the US Supreme Court. ³⁵ It is hard to see the force of this argument. Almost any conceivable decision-rule will eventually involve someone deciding in his own case, in one or maybe two different ways. First, unless it is seriously imagined that issues of right should be decided by an outsider -- by a Rousseauian 'lawgiver' perhaps,³⁶ or by some neo-colonial institution that stands in relation to a given community as (say) the British Privy Council stands in relation to New Zealand - such decisions will inevitably be made by persons whose own rights are affected by the decision. Even a Supreme Court justice gets to have the rights that he determines American citizens to have. We too often forget this: often our scholarly talk about when 'the people' or 'the majority' may be entrusted (by us?) with decisions about rights has something of the haughty air of a John Stuart Mill talking *de haut en bas* about native self-government in India.

It is sometimes said that what *nemo iudex* implies is that a democratic majority should not have the final say as to whether its decision about rights is acceptable. If there is a question about whether the majority's decision is acceptable, then the majority should not adjudicate that question. This will not do either. Unless we envisage a literally endless chain of appeals, there will always be some person or institution whose decision is final. And of that person or institution, we can always say that since it has the last word, its members are ipso facto ruling on the acceptability of their own view. Facile invocations of *nemo iudex in sua causa* are no excuse for forgetting the elementary logic of authority: people disagree and there is need for a final decision and a final decision-procedure.

Invoking *nemo iudex* may be appropriate when one individual or faction purports to adjudicate an issue concerning its own interests, as opposed to those of another individual or faction or as opposed to the rest of the community. (Historically, those who have invoked it against democrat government have often tried to portray democracy as class rule, i.e., self interested rule by the lower classes.) The objection in such cases to A being judge in his (or its) own case is that B (the other party in the dispute) is excluded from the process. But it seems quite inappropriate to invoke this principle in a situation where the community as a whole is attempting to resolve some issue concerning the rights of all the members of the community and attempting to resolve it on a basis of equal participation. There, it seems not just unobjectionable but right that all those who are affected by an issue of rights should participate in the decision (and if we want a Latin tag to answer *nemo iudex*, we can say, 'Quod Omnes tangit ab omnibus decidentur').

9. Begging the Question

Still, the impression of some sort of logical difficulty remains. Surely there is something question-begging in the idea of a democratic decision about democracy? Is there not something circular in assigning to the majority decisions about the nature and limits of majority decision-making? And if it is circular or question-begging, is that not a reason for assigning decisions of this sort to some other individual or institution?

I am not so sure. Let us think it through. Suppose the citizens of a country do not have the legal right to X and that some among them believe that a system of majority decision-making can have no legitimacy in a community whose members do not have that right. Others in the society, who are opposed to the right to X, deny this. If the issue between the pro-X and anti-X factions is dealt with by a majority vote in the legislature, confirming that people are not to have the right to X, the pro-X faction may reasonably refuse to accept the legitimacy of this result. I do not mean they are necessarily right about the relation between X and democracy. I mean that, given the disagreement about this between them and their opponents, any claim that the issue about the right to X was settled legitimately by the vote would indeed be question-begging.

Notice two things about this conclusion, however. First: if, in the absence of a right to X, a majority decision confirming that citizens do not have the right to X is problematic so far as its legitimacy is concerned, the same would have to be said of the opposite decision in these circumstances. So even if the majority had voted the other way - that is, even if they had voted to institute the right to X - that decision too would be tainted by the fact that it was taken among a citizenry who, as things stood, lacked this right thought by one faction to be so essential for legitimate majority decision-making. Pragmatically, of course, the pro-X faction might be expected to take its victories where it found them, and not worry too much about their legitimacy. But that does not make the process any the less tainted, on their own account of democracy.

Secondly, and much more importantly: the fact that a majoritarian process is arguably tainted by the absence of a right to X does not mean that other processes (such as judicial decision-making) are therefore preferable or legitimate. In most cases, the claim that the right to X is one of the conditions of legitimate democracy is unlikely to be true unless X is also one of the conditions of the legitimacy of any political system. Dworkin argues that 'a society in which the majority shows contempt for the needs and prospects of some minority is illegitimate as well as unjust' (25). But surely it follows from this, not only that majority decisions lack political legitimacy in that society, but that legitimacy cannot be accorded to any political decisions, made by any procedure, under the circumstances he mentions. The majority contempt Dworkin describes is liable to destroy the entire basis of political community for the society, depriving any group in it of the right to speak for the society as a whole. The legitimate basis for rule by a monarch would be undermined by the divisions and hatred he imagines, as would rule by an aristocratic elite or, for that matter, rule by the courts. If the circumstances are such as to warrant minority distrust of a dominant majority, they will certainly arouse misgivings about the basis on which judges are selected and the social and political culture that is likely to inform their decisions.

There is an important general point here. Sometimes we talk carelessly as though there were a special problem for the legitimacy of popular majority decision-making, a problem that does not exist for other forms of political organization such as aristocracy or judicial rule. Because the phrase 'tyranny of the majority' trips so easily off the tongue, we tend to forget about other forms of tyranny; we tend to forget that legitimacy is an issue that pertains to all political authority. Indeed it would be very odd if there were a graver problem of legitimacy for popular majoritarian decision-making. Other political systems have all the legitimacy-related dangers of popular majoritarianism: they may get things wrong; they may have an unjust impact on particular individuals or groups; in short, they may act tyrannically. But they have in addition one legitimacy-related defect that popular majoritarianism does not have: they do not allow a voice and a vote in a final decision-procedure to every citizen of the society; instead they proceed to make final decisions about the rights of millions on the basis of the voices and votes of a few.

Of the categories of rights I set out in section 1 of this chapter - (a) rights constitutive of democracy and (b) rights presupposed by democracy—I have concentrated in this section on rights in group (b). I did so because this group seemed most promising for Dworkin's claim that there is something question-begging about using majority procedures to determine what rights

Suppose citizens disagree about the basis of suffrage, about campaign finance, or about proportional representation. In extreme cases, one side to the disagreement may claim that a majority-decision made in the absence of the constitutive right that they are arguing about has no legitimacy whatsoever: They may say, for example - quite plausibly - that a majority of men has no moral right to decide in the name of the whole community whether women shall have the right to vote. As before, it does not follow that some other body - the monarch or the courts - has the right to decide this issue simply because the male citizenry does not. What follows is that we are left in a legitimacy-free zone in which the best that we can hope for is that a legitimate democratic system emerges somehow or other. This is not the same as saying we are now using a results-driven test of legitimacy. It is rather a pragmatic expression of hope in circumstances where it is not open to us to use any communal criterion of legitimacy at all.

To repeat, then: the situation may be such that the legitimacy of any political decision about a right associated with democracy, by any procedure or institution, is thrown in doubt. That, I think, is undeniable. Does it not follow, then, that in these circumstances we have to appeal to a results-driven approach? It does not, for two reasons.

First, as we have already seen, the existence of controversy about the rights associated with democracy means that a results-driven approach is unavailable too, or unavailable to us as a political community. Individuals and factions may have their own result-based opinions of course, but then they will also have their own opinions about procedures (for example, their own opinions about the relation between democracy and the right in question). There is thus no advantage either way for a results-driven as opposed to a proceduralist approach.

Secondly, it is possible, as a matter of practical politics, to use an ordinary and familiar procedure like majority-decision to settle one of these questions, while leaving open the issue of legitimacy. Suppose, for example, that we use majoritarian procedure A to decide whether to continue with a procedure of that kind in our politics or to replace it with a somewhat different political procedure B. And suppose we vote to retain procedure A. We may accept that vote as a pragmatic matter, without investing it with democratic legitimacy in any particularly question-begging way. In other words, the fact that, pragmatically, we have to find some way of resolving disagreements about the rights associated with democracy does not mean that we have no choice but to adopt a results-driven test. The pragmatics may drive us instead to an informal and unfreighted use of some familiar decision-procedure, a use that does not beg the questions of legitimacy that are at issue. (Notice, of course, that all this can also be said about a results-driven test. If we can get away with using a partisan results-driven test such as the Rawlsian one, that too can be a purely pragmatic basis for constitutional design. In other words, the pragmatic possibility I am outlining in this paragraph is open to both sides. All I am insisting on in this section is that we are not required to adopt a results-driven approach: pragmatism, in this regard, is not necessarily the same as orientation to results.)

Sure, to a careless eye, it may look as though we are privileging one of the possible outcomes - namely, procedure A - by using it as the procedure for deciding among the possible outcomes. And - I have heard people say - if it makes sense to privilege one of the outcomes in this case, why does it not also make sense to privilege one of the outcomes in an ordinary case where substantive rather than procedural questions are at stake? But to decide among procedures A and B by using procedure A as our method is not to privilege procedure A; it is simply to use it. If we choose one of the procedures which are up for

decision as the procedure for making that very decision, we do so simply because we need a procedure on this occasion and this is the one we are stuck with for the time being.

Remember, finally, that the fact that an issue concerns a right associated with democracy does not mean that we are necessarily brought to the impasse I have been discussing. For one thing, the right in question may be incidental rather than central to democratic legitimacy. Democracy is a complex and variegated ideal, and some of the rights associated with it in one type of system may be called in question without anyone thinking that therefore democracy as such is called in question. For another thing, even if the right in question is thought by one side to be essential to democracy, it does not follow that a majority-decision is question-begging. Suppose that the right to X is in question among the members of a community all of whom currently do have the right to X, and that some think, as before, that X is one of the conditions of legitimate democracy while others deny this. And suppose the people (or their representatives) vote by a majority for a bill that narrows or abrogates the right to X. Can this majority-decision be criticized by the pro-X faction as illegitimate? Is any claim about the legitimacy of this decision question-begging as between the proponents and the opponents of the right to X? Surely not. Unless there is some other problem with democracy in the society (a problem undisclosed in the terms of our hypothetical), the decision about X has been made under what the pro-X faction regard as the optimal conditions of legitimacy. People had their right to X and they made a collective decision (about that right). Certainly the pro-X faction will have their doubts about political decisions subsequent to this one, for they will think the abrogation of X has undermined the prospective legitimacy of majoritarianism in that community. But these doubts will affect all subsequent political decisions ~ on substantive as well as procedural matters - and (as before) decisions made by courts as much as decisions made by popular majorities. They will even affect the legitimacy of a future decision to restore the right to X. So we see once again there is nothing necessarily circular about majority decision-making on an issue concerning the rights associated with democracy.

10. Summa Contra Dworkin

The conclusions of this chapter so far may be summarized as follows. We examined Ronald Dworkin's arguments in *Freedom's Law* in favour of judicial review on the American model, and we accepted the following positions he defended: (1) there is an important connection between rights and democracy; (2) some individual rights must be regarded as conditions on the legitimacy of majority-decision, and (3) if people disagree about the conditions of democracy, an appeal to the legitimacy of majority-decision to settle that disagreement may be question-begging.

However, we also argued for the following claims, which contradict the inferences that Dworkin wanted to draw from (3). We argued (4) that if an appeal to the legitimacy of majority-decision to settle a disagreement about the conditions of democracy is question-begging, then an appeal to the legitimacy of judicial review (or any political procedure) to settle that disagreement is also likely to be question-begging; (5) the fact that an appeal to the legitimacy of majority-decision to settle a disagreement about the conditions of democracy is question-begging does not mean that we have no choice but to use a decision-procedure selected according to a results-driven test; and (6) in cases where an appeal to the legitimacy of majority-decision to settle a disagreement about the conditions of democracy is not question-begging, there is no reason to disparage majority decision on the basis of *nemo iudex in sua causa*.

Against Dworkin's central argument in *Freedom's Law*, we argued (7) that there is always a loss to democracy when a view about the conditions of democracy is imposed by a non-democratic institution, even when the view is correct and its imposition improves the democracy. We also argued, near the beginning of the chapter, against a couple of incidental positions that Dworkin maintains. We argued (8) that there is no reason to think that judicial review improves the quality of participatory political debate in a

society, and (9) that it is an open question whether judicial review has made the United States (or would make any society) more just than it would have been without that practice.

11. Is Everything Up for Grabs?

I have argued that there is nothing particularly question-begging about assigning issues about democracy to popular participatory procedures. There is nothing logically inappropriate about invoking the right to participate to determine issues about rights, including issues about participation itself. There is no reason, therefore, why each individual's claim to participate in the making of the laws by which he is governed should be arrested at the threshold of procedure. Logic does not require us to assign questions about political and constitutional arrangements for final decision to a non-participatory institution. On the contrary, there is something democratically incomplete - certainly something unpleasantly condescending - about a constitution that empowers a small group of judges or other officials to veto what the people or their representatives have settled on as their answers to disputed questions about what democracy involves.

Still, none of this assuages the worries with which we began. Granted there is nothing illogical in assigning disputes about the rights associated with democracy to a majoritarian procedure, what guarantee do we have that such rights would be respected? How can rights be secure if they are at the mercy of majority-decision? How is respect for rights consistent with a process that appears to place no a priori limits on political outcomes? Do the conclusions to which we have been driven not leave everything up for grabs?

The most straightforward answer is 'Yes - everything is up for grabs in a democracy, including the rights associated with democracy itself.' Or, certainly, everything is up for grabs which is the subject of good-faith disagreement. That's the key to the matter, for to say that something which was the subject of good-faith disagreement was nevertheless not up for grabs would be to imagine ourselves, as a community, in a position to take sides in such a disagreement without ever appearing to have done so. Suppose again that the members of a community disagree about whether people ought to have the right to X. To say that, nevertheless, the right to X should not be up for grabs in this community, is to say that the community has already taken a side in this disagreement. And one is entitled to wonder how exactly that came about (given the disagreement) without at some earlier stage the right to X having indeed been up for grabs in a decision procedure addressing the question of whether this right was something to which the community ought to commit itself.

The panic about everything being 'up for grabs' is of course in part a panic about self-government in the political realm. We are not sure of each other in the way we purport to be sure of ourselves. We want to govern ourselves - I mean govern ourselves politically, acting together, acting in the company of others - but we know we disagree about the principles on which such government should be conducted. Each of us therefore must face the prospect that the values he takes seriously, the priorities he has, the principles to which he has a strong attachment, may not be the values, priorities, and principles held by the voter in the next booth. We can try if we like to suppress these disagreements, to denigrate the other's views as selfish or irrational and exclude them as far as possible from our politics. But, as I have argued, we can hardly do this in the name of rights, if it is part of the idea of rights that a right-bearer is to be respected as a separate moral agent with his own sense of justice. If, on the other hand, we resolve to treat each other's views with respect, if we do not seek to hide the fact of our differences or to suppress dissent, then we have no choice but to adopt procedures for settling political disagreements which do not themselves specify what the outcome is to be.³⁷ In that sense, politics does leave things up for grabs in a way that is bound to be disconcerting from each individual's point of view. Respect for the opinions and consciences of others means that a single individual does not have the sort of control over political outcomes that his conscience or his own principles appear to dictate. That bullet, I think, simply has to be bitten.

'Up for grabs', however, may indicate a couple of other things, neither of which is entailed by the position that I have been arguing for.

'Grabs' can connote selfish pork-barrelling - a feeding frenzy of interest rather than a good faith disagreement of principle. Reasonable men and women will quite properly be alarmed by the prospects for rights in a society where each citizen and interest group is attempting to grab as much as it can. Rights generally would be in peril in such a situation, including of course the rights that are constitutive of democracy. My argument has proceeded on the premise that democratic politics need not be like that, and that it is in fact much less like that than the denigrators of popular majoritarianism tend to claim. I have insisted too that we should resist the temptation to say that it is like that simply because we find ourselves contradicted or outvoted on some matter of principle. We do not need to invoke self-interest to explain disagreement about rights, for it is sufficiently explained by the difficulty of the subject-matter and by what John Rawls called 'the burdens of judgment'.³⁸ If we ascribe someone's political difference with us to the influence of self-interest, that must be justified as a special explanation, over and above the normal explanation of human disagreement about complex questions.

I may be wrong about all this, of course: perhaps politics just is a clash of interests. (There is a danger, too, that this is what it is becoming around the world, as a sort of self-fulfilling prophecy evoked by the contempt for legislative politics exported triumphantly as the American contribution to democratic theory.) But if so, we should recognize that it is not just the reputation of popular majoritarianism that is in danger. If democratic politics is just an unholy scramble for personal advantage, then individual men and women are not the creatures that theorists of rights have taken them to be. If we think nevertheless that certain interests of theirs require special protection (against majorities and other kinds of tyrant), we shall have to develop a theory of justice and a theory of politics that does not associate the call for such protection with the active respect for moral capacity that the idea of rights has traditionally involved.

Mostly, however, what I want to insist on is this. The alternative to a self-interest model of politics is not a scenario in which individuals, as responsible moral agents, converge on a single set of principles which add up to the truth about justice, rights and the common good. That would not be a credible alternative from a social science point of view. The proper alternative to the self-interest model is a model of opinionated disagreement - a noisy scenario in which men and women of high spirit argue passionately and vociferously about what rights we have, what justice requires, and what the common good amounts to, motivated in their disagreement not by what's in it for them but by a desire to get it right. If we take that as our alternative model, we may be more inclined to recognize that real world politics are not necessarily governed by self-interest than if we think the only alternative to the self-interest model is one which has high-minded citizens converging on the truth. I have tried to show that we can construct a theory of politics for the model of opinionated disagreement - a theory of legitimate decision-procedures which works on the assumption that people who really care about justice and rights may nevertheless disagree about what they entail. Of course any political theory is bound to be something of an ideal-type in relation to the messiness of the real world.³⁹ A full and faithful account may require us to blend in elements from a variety of theories. What I am suggesting, however, is that if we want to do justice to that part of our political experience which involves people sometimes being prepared to consult their ideals as well as their utilities, then it is the model of disagreement, not the model of moral convergence, that we should reach for to blend with or qualify the more cynical model of interest.

The second sense of 'up for grabs' that I want to disown has to do with hasty, volatile, and impetuous 'grabbing'. That a certain right is 'up for grabs' in majoritarian politics may mean that it is respected today, abrogated tomorrow, and reinstated in an amended form on Monday morning. We alluded briefly [in Chapter Five] to Thomas Hobbes's suggestion that one of the most distinctive features of democratic politics is its inconstancy.⁴⁰ There are a variety of ways in which a democratic constitution may mitigate this inconstancy. The legislative process may be made more complex and laborious, and in various ways

it may be made difficult to revisit questions of principle for a certain time after they have been settled. (Such 'slowing-down' devices may also be supported in the political community by values associated with 'the rule of law'.) None of this need be regarded as an affront to democracy; certainly a 'slowing-down' device of this sort is not like the affront to democracy involved in removing issues from a vote altogether and assigning them to a separate non-representative forum like a court. However, [as I argued in Chapter Twelve] democracy would be affronted by any attempt to associate such 'slowing down' with the idea that there is something pathological about one side or the other in a disagreement of principle. In that chapter, I argued against the 'Ulysses and the Sirens' model of precommitment, which presents constitutional constraints as a form of immunization against madness. We are not entitled to secure stability at the cost of silencing dissent or disenfranchising those who express it. And we should not use the ideas of constitutional caution or constitutional commitment as a way of precluding effective deliberation on a matter on which the citizens are still developing and debating their various views.

12. Disagreement About Limits

We know that if rights are entrusted to the people for protection they will be entrusted to men and women who disagree about what they amount to. It is tempting to infer, from the fact of such disagreement and from the processes (like voting) which will be necessary to resolve it, that this sort of protection in politics is as good as no protection at all. It is tempting to think that people who are prepared to countenance voting on matters of fundamental right, and to accept the view of the majority, simply do not take rights seriously.

Actually that is a temptation which is awfully easy to resist in certain contexts. For nobody thinks this about a tribunal like the United States Supreme Court. Surely the Justices on the Supreme Court take rights seriously if anybody does. Yet the Justices disagree about rights as much as anyone, and they resolve those disagreements by simple majority-voting. The established practice in America is that the people are to accept as authoritative a determination by the Court as to what rights they have, even when that determination is based on a knife-edge 5-to-4 vote among the Justices. We count heads on the court, we call for the appointment of a conservative or a liberal Justice, we talk about a particular Justice being the 'swing vote' on the court - and none of this seems to shake our confidence that rights are being addressed in the only way they could be addressed among articulate and opinionated individuals. We cannot therefore argue that rights are not being taken seriously in a political system simply on the ground that the system allows majority voting to settle disagreements as to what rights there are. On the contrary, a political culture - such as that which pervades and surrounds the US Supreme Court - may be a culture of rights, a culture in which rights are taken with the utmost seriousness, even though it is at the same time a culture of disagreement and a culture oriented to the idea that at the end of the day there may be nothing to do about a disagreement except count up the ayes and the noes.

Equally, I think we should not underestimate the extent to which the idea of rights may pervade legislative or electoral politics. The idea of rights is the idea that there are limits on what we may do to each other, or demand from each other, for the sake of the common good. A political culture in which citizens and legislators share this idea but disagree about what the limits are is quite different from a political culture uncontaminated by the idea of limits, and I think we sell ourselves terribly short in our constitutional thinking if we say that the fact of disagreement means we might as well not have the idea of rights or limits at all.

I want to end with two examples from the classics of liberal political philosophy, which will help to explain what I mean.

The first is the example of John Locke, well known as the founder of modern liberalism, and well known too for his insistence that the authority of the legislature is limited by respect for the natural rights - the

lives, liberties, and property ~ of the people.⁴¹ Legislators, said Locke, are not entitled to do just as they like. If they 'endeavour to invade the Property of the Subject, and to make themselves. . . Masters, or Arbitrary Disposers of the Lives, Liberties, or Fortunes of the People', they forfeit their authority. 'These are the bounds which the trust that is put in them by the Society, and the Law of God and Nature, have set to the Legislative Power of every Commonwealth.'⁴² Yet Locke conjoined this classic liberal doctrine of the limited legislature with an insistence that '[i]n all Cases, whilst the Government subsists, the Legislative is the Supream Power. . . and all other Powers in any Members or parts of the Society [are] derived from and subordinate to it.'⁴³ The conjunction sounds curious to our jaded ears: how can he possibly mean what he says about a limited legislature, if he is not prepared to countenance any superior institution (like a court) to do the limiting? Is a theory of limits without institutional enforcement not the same as no theory of limits at all?

The question ignores the importance of political culture and public political understanding. 'To understand Political Power right' is the aim of the *Second Treatise*;⁴⁴ and the assumption on which Locke proceeds is that a polity pervaded by a right understanding will differ remarkably in its character and operations from a polity whose members are under willful or negligent misapprehensions about the rights and basis of government.⁴⁵

The idea of right-based limits is thus, in the first instance, a matter of political self-understanding. It seemed important to Locke that legislators should go about their task imbued with a moral and philosophical sense that there are limits to what they may do, and that they should commit themselves (as a matter of virtue or duty associated with their office) to ascertain what those limits are and whether or not they are contravened by the legislative proposals that come before them. It seemed to him also important for citizens to imbue their deference to the authority of the legislature with an exactly similar sense. They should act and respond to its dictates with an awareness that they are not required (by social contract etc.) to do whatever the legislature says, but that they are entitled to disobey or in extremis rebel when it goes beyond its limits. Accordingly citizens should understand that they, too, must try as hard as they can to understand what those limits are and whether or not the laws that are presented to them contravene those limits. Moreover, Locke wants to encourage a political culture in which people accompany these convictions with a sense that the matters in question are objective, and that they may get it wrong, and that if they do, they are answerable to God for their mistakes and for whatever havoc results.

Still - someone may respond - political culture and self-understanding are all very well; but why was Locke unwilling to countenance some arrangement like a supreme court to make a final determination about whether the legislature has betrayed its trust? Why would he not consider the option of the judicial review of legislation?

Scholars have noted that Locke says very little about the judiciary as a distinct branch of government. Peter Laslett argues that on Locke's account the judiciary was not a separate power at all: '[I]t was the general attribute of the state.'⁴⁶ To govern, on Locke's account, is to make a public judgement as to what natural law requires - both in general and in detail - and to set that judgement up as a basis for social coordination and enforcement. And that is what the Lockean legislature does. Unless one is proposing a bicameral legislature (something with which Locke had no difficulty),⁴⁷ there is no need for an additional institution to test whether the legislature's enactments are in accordance with natural law. That is what legislating is; that is the function that legislators are supposed to perform as they deliberate and vote. To the extent that members of the society disagree about this - to the extent that the natural law limits are controversial - legislation just is the adjudication of those controversies.

In theory, that function might be performed by a nine man junta clad in black robes and surrounded by law clerks. They might be the ones who deliberate and judge and vote on these issues. Locke's point here is more or less the same as Hobbes's:⁴⁸ whatever is the supreme power is in effect the legislature. But

Locke puts it more carefully and democratically than Hobbes does. His position seems to be that, if there are controversies among us about natural law, it is important that a representative assembly resolve them.⁴⁹ He thinks it important that the institution which, by its representative character, embodies our 'mutual Influence, Sympathy, and Connexion,⁵⁰ should also be the one which determines our disagreements about justice, rights, the common good, and natural law. The institution which comprises our representatives and the institution which resolves Our ultimate differences in moral principle should be one and the same. It is by combining these functions that the legislature embodies our deliberative virtue and our sense of mutual responsibility. 'This', as Locke says, 'is the Soul that gives Form, Life, and Unity to the Commonwealth', and this is why an assault on the integrity or position of the legislature (whether from inside or outside its ranks) is the most heinous attack on 'the Essence and Union of the Society'.⁵¹

I find this a powerful and appealing position. It embodies a conviction that these issues of principle are ours to deal with, so that even if they must be dealt with by some institution which comprises fewer than all of us, it should nevertheless be an institution that is diverse and plural and which, through something like electoral accountability, embodies the spirit of self-government, a body in which we can discern the manifest footprints of our own original consent.⁵² It connects the themes we have been pursuing [in this part of the book] with the themes we pursued [in Chapters Two through Five] - the importance of matters on which there are different views and variegated opinions being settled by institutions which in their size and diversity pay tribute to the essential plurality of politics.

The second of the two examples I said I would invoke from the canon of political theory is the example of John Stuart Mill, in the argument about individual freedom that he presented in the essay *On Liberty*. When my students read *On Liberty*, they assume almost without thinking that it is a defence of the First Amendment, and a call for the institution of some similar constitutional constraint in Victorian England. It does not occur to them to take seriously Mill's insistence that he is not talking about laws and constitutions at all, that he is addressing himself to public opinion, that he is seeking to raise 'a strong barrier of moral conviction,⁵³ against 'an increasing inclination to stretch unduly the powers of society over the individual both by the force of opinion and even by that of legislation'.⁵⁴ In our modern preoccupation with mechanisms of enforcement, we tend to lose sight of the possibility that freedom of thought and discussion might be respected more on account of the prevalence of a spirit of liberty among the people and their representatives ~ a political culture of mutual respect--than as a result of formal declarations or other institutional arrangements.⁵⁵ That I think is serious short-sightedness. As the fate of scores of 'constitutions' around the world shows, paper declarations are worth little if not accompanied by the appropriate political culture of liberty. And political philosophy, if it has any effect in the world at all, is likely to have much more effect on political culture than it has on political institutions per se, even if that effect is more diffuse and less flattering to ourselves as would-be counsellors to the powerful.⁵⁶ In other words, I think that in political philosophy we should be as interested in the condition of political culture - the array of current understandings - as we are in having our own cherished principles institutionalized.

Certainly that was Mill's view. Individual liberty cannot be expected to hold its ground, said Mill, 'unless the intelligent part of the public can be made to feel its value'.⁵⁷ If we are concerned about individual liberty, then, the first thing we should do is not call for a Bill of Rights to be enforced by a court, but develop among ourselves a culture of liberty in which the idea is appreciated and taken seriously among those who will be participating in major social and political decisions. And - as I suggested [in Chapters Ten and Eleven] - this is what we should want to do anyway, if we really take liberty seriously. For we cannot seriously think that liberty in general is safe in a society in which it is an accepted political tactic to regard ordinary citizens as nothing but selfish and irresponsible members of predatory political majorities. Taking liberty seriously means taking each other seriously as holders of views about liberty.

But here's the twist. We cannot expect any idea - let alone the idea of liberty - to be taken seriously in society, we cannot expect the intelligent part of the public to feel its value, if it is not itself subject to

vigorous debate and contestation. That is the argument put forward in defence of freedom of thought and discussion in Chapter Two of Mill's essay - the argument about the importance of disagreement in a vigorous and progressive culture. And obviously it applies reflexively to liberty itself. The principle of liberty and the principles underlying other rights are no exception to Mill's argument that, without genuine debate and disagreement, a creed adopted among the people tends

“to be received passively, not actively, . . . incrusting and petrifying [the mind] against all other influences addressed to the higher parts of our nature; manifesting its power by not suffering any fresh and living conviction to get in, but itself doing nothing for the mind or heart except standing sentinel over them to keep them vacant.” 58

Mill is notorious for the suggestion that it might even be necessary sometimes to actually manufacture disagreement, if dissent is not available to perform this invigorating function. If people did not disagree about an issue of right, we might have to provide 'some contrivance for making the difficulties of the question as present to [each person's] consciousness as if they were pressed upon him by a dissentient champion, eager for his conversion'.⁵⁹ Fortunately we are not in that situation. Since there are people who disagree about any given proposition of right, and who will voice that disagreement 'if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice that there is someone to do for us what we otherwise ought, if we have any regard for either the certainty or vitality of our convictions, to do with much greater labor for ourselves'.⁶⁰

That, I think, is as good a place as any to finish. We do disagree about rights, and it is understandable that we do. We should neither fear nor be ashamed of such disagreement, nor hush and hustle it away from the forums in which important decisions of principle are made in our society. We should welcome it. Such disagreement is a sign - the best possible sign in modern circumstances - that people take rights seriously. Of course, as I have said a million times, a person who finds himself in disagreement with others is not for that reason disqualified from regarding his own view as correct. We must, each of us, keep faith with our own convictions. But taking rights seriously is also a matter of how we respond to contradiction by others, even on an issue of rights. Though each of us reasonably regards his own views as important, we must also (each of us) respect the elementary condition of being with others, which is both the essence of politics and the principle of recognition that lies at the heart of the idea of rights. When one confronts a right-bearer, one is not just dealing with a person entitled to liberty, sustenance, or protection. One is confronting above all a particular intelligence - a mind and consciousness which is not one's own, which is not under one's intellectual control, which has its own view of the world and its own account of the proper basis of relations with those whom it too sees as other. To take rights seriously, then, is to respond respectfully to this aspect of otherness and then to be willing to participate vigorously - but as an equal - in the determination of how we are to live together in the circumstances and the society that we share.

Notes

1 See Rawls, *Political Liberalism*, 19.

2 See, e.g., Beitz, *Political Equality*, Ch. 4. See also Ch. 5, s. 14, of *Law and Disagreement*.

3 In this chapter, numbers in parentheses are page references to Dworkin, *Freedom's Law*.

4 See Shue, *Basic Rights*, Ch. 1.

5 See Hohfeld, *Fundamental Legal Conceptions*, 50 ff.

6 The best known example is Ely, *Democracy and Distrust*.

7 Idem.

8 See Dworkin, *A Matter of Principle*, 59-69. See also Waldron, 'A Right-Based Critique of Constitutional Rights', 39-41.

9 See Dworkin, *A Matter of Principle*, 9-71, Dworkin, *A Bill of Rights for Britain*, and Dworkin, *Law's Empire*, Ch. 10.

10 See also Black, *A New Birth of Freedom*, 5 and 89.

11 Dworkin, *Law's Empire*, 356.

12 See Ch. 12, fn. 1 and accompanying text in *Law and Disagreement*. (Professor Dworkin has indicated in conversation that he does not now hold the view attributed to him in that passage.)

13 Dworkin, *Law's Empire*, 356.

14 *Brown v. Board of Education* 347 US 483 (1954).

15 Though see also Rosenberg, *The Hollow Hope*, 39-169.

16 See Dahl, *Democracy and its Critics*, 189.

17 For a list, see Forbath, *Law and the Shaping of the American Labor Movement*, Appendices A and C.

18 *Ibid.*, 37-58.

19 For examples of the kinds of case Dworkin is referring to here, see those cited in Ch. 12, fn. 31, *Law and Disagreement*.

20 *Roe v. Wade*, 410 US 113 (1973).

21 This, Dworkin says, is particularly the case if the debate is oriented towards what he calls a 'moral reading' of the Constitution (7-15).

22 See also the discussion in Ch. 10, s. 4.

23 Report of the Committee on Homosexual Offences and Prostitution, Cmd. no. 247 (1957).

24 See Hart, *Law, Liberty and Morality* and Devlin, *The Enforcement of Morals*.

25 *Bowers v. Hardwick* 478 US 186 (1986).

26 Glendon, *Rights Talk*, 151.

27 I am grateful to Stephen Perry for this point.

28 See Dworkin, *Freedom's Law*, 34: 'People can be expected to disagree about which structure is overall best, and so in certain circumstances they need a decision procedure for deciding that question, which is exactly what a theory of democracy cannot provide. That is why the initial making of a political constitution is such a mysterious matter. . . .'

29 Ely, Democracy and Distrust.

30 For the connection between liberal political theory and enlightenment optimism in epistemology, see Waldron, 'Theoretical Foundations of Liberalism'. 31 Locke, An Essay Concerning Human Understanding, Epistle to the Reader. 32 See Hobbes, Leviathan, Chapter 17, 120-1; Locke, Two Treatises of Government, II, paras. 95-8 and 132-3, 330-3 and 354-5.

33 Hobbes, Leviathan, Ch. 19.

34 See Hobbes, The Elements of Law, Part II, Ch. XXI: 'The first in order of time of these three sorts [of commonwealth] is democracy, and it must be so of necessity, because an aristocracy and a monarchy, require nomination of persons agreed upon; which agreement in a great multitude of men must consist in the consent of the major part; and where the votes of the major part involve the votes of the rest, there is actually a democracy.'

35 I am grateful to George Kateb for insisting that I confront this point.

36 See Rousseau, The Social Contract, Bk. II, Ch. 7, 76-9.

37 See Ch. 5, ss. 2 and 9, Law and Disagreement.

38 Rawls, Political Liberalism, 54-8. For a discussion of 'the burdens of judgment', see Ch. 5, s. 12 and Ch. 7, s. 2 of Law and Disagreement.

39 For this notion of ideal-type, see Weber, Economy and Society, Vol. I, 20-2.

40 Hobbes, De Cive, Ch. X, 137-8.

41 The paragraphs that follow are Lectures, 'Locke's Legislature'. Ch.4.)

42 Locke, Two Treatises of Government, II, para. 142, 363.

43 Ibid., II, para. 150, 367-8. The conjunction is not inadvertent on Locke's part: it's not a matter of our juxtaposing two disparate parts of a patchwork manuscript. On the contrary, Locke makes it explicit in a single passage: 'Though the Legislative, whether placed in one or more, whether it be always in being, or only by intervals, tho' it be the Supreme Power in every Commonwealth; yet, First, It is not, nor can possibly be absolutely Arbitrary over the Lives and fortunes of the People.' (Ibid., II, para. 135, 357.)

44 Locke, Two Treatises of Government, II, para. 4, 269 (my emphasis).

45 See *ibid.*, II, para. III, 343. See also Locke's insistence in the 'Preface' to the Two Treatises of Government that 'there cannot be done a greater Mischief to Prince and People, than the propagating wrong Notions concerning Government' (*ibid.*, 138).

46 Laslett, 'Introduction' to Locke, Two Treatises of Government, 120.

47 See Locke, Two Treatises of Government, II, para. 213, 408.

48 Hobbes, Leviathan, Ch. XXVI, 184.

49 See especially Locke, Two Treatises of Government, II, para. 94, 329-30 and para. 143, 364.

50 Ibid., II, para. 212, 407.

51 Idem.

52 The phrase is from Pangle, *The Spirit of Modern Republicanism*, 254.

53 Mill, *On Liberty*, Ch. 1, 18 (my emphasis).

54. Idem.

55 Cf. Alexander Hamilton in *The Federalist Papers* LXXXIV, 476-7: The security of a right like freedom of the press, 'whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, . . . must we seek for the only solid basis of all our rights.'

35 36 37 38

39 40 41

adapted from the first of my 1996 Seeley (See Waldron, *The Dignity of Legislation*,

46 47 48 49

50 51 52 53 54 55

56 See Waldron, 'What Plato Would Allow' and also Waldron, 'Dirty Little Secret.'

57 Mill, *On Liberty*, Ch. 3, 90.

58 Ibid., Ch. 2, 49-50.

59 Ibid., Ch. 2, 53-4.

60 Ibid., Ch. 2, 55.

83

Would Allow' and also Waldron, 'Dirty Little

