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Democracy as Public Law: The Case of Constitutional Rights

By Richard Bellamy[*]

A. Introduction

The distinctive domain and character of public law have become—and in certain respects always were—unclear and, to a degree, contested.[1] As a result, any definition is likely to be to some extent stipulative. For my purposes, I want to refer to public law in two broad and related senses—as applying to a certain kind of body and its functions, and as requiring a certain kind of justification. The first sense refers to the actions of the state and its administration. Of course, it will be pointed out that these are increasingly performed by private bodies and often involve legal activities that have been associated with private parties and doctrines, such as procurement and contract.[2] Nevertheless, government and the administrative apparatus more generally can still be considered as possessing distinctively broad, authoritative, and coercive powers which in various ways make their subjection to the law both problematic and pressing: Problematic in that they play a central role in the making and enforcement of the law, pressing in that this role renders them more powerful than other bodies. The second sense enters here. For the justification of state power has come to rest on its serving the public ends of the ruled rather than private ends of the rulers, and certain public qualities of law have been thought to oblige those who wield state power to do so in a publically justified and justifiable way. Ruling through laws has been viewed as different from rule by willful, ad hoc commands because laws have certain characteristics that render them capable of coordinating and shaping public behavior in consistent and coherent ways over time, while ruling under the law likewise forces rulers to adopt public processes and offers an additional incentive to devise laws that treat rulers and ruled equitably.[3] Again, these matters are far from straightforward. How far laws need to, or even can, always possess the requisite qualities

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[1] *See* Neil Walker, *On the Necessarily Public Character of Law*, *in* THE PUBLIC IN LAW: REPRESENTATIONS OF THE POLITICAL IN LEGAL DISCOURSE 9 (Claudio Michelon et al. eds., 2012).

[2] *See id.* at 10–12.

[3] *See* LON L. FULLER, THE MORALITY OF LAW 33–38 (1964).

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and the degree to which these do constrain power holders are matters of dispute.[4] Yet, that all law has to have some public qualities—for example, that it be promulgated and capable of being followed in ways that make it publicly recognized as law—and that these features formalize power to a degree, is reasonably undisputed. Increasingly, though, and even more controversially, many jurists have wanted to suggest that legality also involves certain substantive qualities of a public kind—that laws must appeal to public reasons that all subject to them can accept as reflecting, or being compatible with certain basic interests or values that are equally shared by all. Such arguments have come to be identified with rights and in particular constitutional rights, which are deemed to set the terms of how and to what purpose political power may be legally exercised.[5] In this way, the two senses of public law come together. Constitutional rights define and mark the limits of public power in ways that can be publicly justified, and thereby ensure it serves public ends.[6] They thereby serve what Martin Loughlin[7] calls the "basic tasks of public law;" namely, "the constitution, maintenance and regulation of governmental authority."

In what follows, I want to explore a paradox in this account. What is missing in this view is the public as actors themselves. They are the supposed beneficiaries of public law, whose interests it exists to protect and promote in the activities of those political authorities that act on their behalf. Yet, the public reason of the law does not actively involve the reasoning of the public themselves. The rule of persons comes under the rule of law through being entrusted to putatively non-political actors—courts and legal officers—and guided by legal norms that are held logically to prefigure the public political authorities they constitute, maintain, and regulate. Indeed, in a certain sense this view conceives public law as bringing into being the public itself, as a society of individuals politically united to secure and enjoy their pre-existing rights.[8] Against this account, I want to present a democratic view of public law as the rule of the public. In this view, democratic mechanisms offer the means for the public not just to authorize and control those who rule, be it through elections or via their representatives in the legislature, but also to generate and justify law and policies that reflect the reasons of the public. Democracy satisfies both senses of public law outlined above; it offers oversight of the public authorities and their functions, and does so in conformity to public processes and norms. However, in each case, it is the public itself that does so, through their actions and reasons

[4] *See* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 57–66 (2007); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (1979); JEREMY WALDRON, LAW AND DISAGREEMENT (2001).

[5] *See* RONALD DWORKIN, *Political Judges and the Rule of Law*, *in* A MATTER OF PRINCIPLE 9, 11–12 (1985); JOHN RAWLS, POLITICAL LIBERALISM 212–54 (1993).

[6] *See* RAWLS, *supra* note 5, at 232.

[7] MARTIN LOUGHLIN, THE IDEA OF PUBLIC LAW 1 (2003).

[8] *See* DWORKIN, *supra* note 5, at 32.

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rather than via legal intermediaries. In this way, democracy undertakes "the basic tasks of public law" by providing the process whereby the public constitutes, maintains, and regulates government authority by setting the terms and conditions under which power can be legitimately held and exercised over them. It will be objected that this process itself will need to be constituted, maintained, and regulated and some of its decisions be constrained to protect some sections of the public oppressing or neglecting the concerns of other sections of the public, and that these are the tasks that public law—especially in the form of constitutional rights—performs.[9] However, I wish to dispute this very claim and argue that for such rights to be justified and have validity as law that can apply to and serve the interests of the public, then such rights need to be themselves constituted through, maintained, and regulated via a democratic process. Naturally, constitutional rights do not exhaust the field of public law. However, they now lie at its heart, with their relationship to democracy forming a key issue in modern conceptions of public law.[10] If they can be shown to lie within democracy, therefore, then an important part of the argument for conceiving public law as democracy will have been achieved. That does not mean there is no role for courts or for laws that pertain to public bodies; merely that the legitimacy of courts rests on their being servants of the public responsible for administering law that ultimately has the public as its source.[11]

I proceed to this conclusion in three main steps. First, I argue that for rights to be justified as principles of public reason that treat all with equal concern and respect, they must meet with democratic endorsement. Second, I contend that rights so conceived can still perform the key role that is often attributed to them as ways of constraining the exercise of government authority. I suggest that the extra-democratic and counter-democratic view of rights, on the one hand, and the democratic view of rights, on the other, can be linked to liberal and republican views of freedom as non-interference and as non-domination respectively. When freedom is seen in the more holistic terms of the latter, then rights as appear in their true light as public goods with democracy the only heuristic for their identification and promotion in a non-dominating manner. Finally, I argue that the democratic process need not be seen as being itself constituted through rights and regulated by constitutional courts. However, it may generate its own public laws, which provide a basis for some members of the public to use the courts to contest the degree to which other members of the public uphold the public standards they have authored together. In certain respects, the UK Human Rights Act 1998 can be conceived in these terms, as a form of `weak' review that leaves the last word with democracy and allowing it may constitute, maintain, and regulate itself through the laws it enacts.[12]

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[9] *See* DWORKIN, *supra* note 5, at 27–28.

[10] *See* LOUGHLIN, *supra* note 7, at 114–15, 128–30.

[11] *See* Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675 (2009).

[12] *See* Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. CONST. L. 86 (2011).

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B. Rights, Political Equality, and Democracy

Rights theorists working within the mainstream liberal tradition typically distinguish human and natural from institutional rights on the grounds that the former are in some sense prior to politics.[13] That is to say, they are either moral entitlements that human beings could and ought to be granted even in a putative state of nature, such as freedom from physical assault, or—more demandingly—they encompass those basic interests of human beings that all political communities should seek to secure not just for their members but also for non-members. In other words, such rights should either exist outside of any polity, or be realized within and upheld by all polities. As such, they define the boundaries, foundations, and, to some extent, the goals of politics.[14]

So conceived, rights readily appear as constraints on democracy. Rights can be viewed as "trumping" those political decisions that curtail or fail to promote them. Yet, their apparent status as somehow prior to and above politics proves hard to sustain. Rights are sometimes presented as a two-term relationship, whereby *X* has a right to some *Y*. That gives rights a somewhat peremptory sounding character. However, rights are always a three-term relationship, whereby *X* asks some *Z* to recognize and respect his or her claim to *Y*, with attendant costs and benefits to *Z*, who will wish *X* to likewise recognize either his or her similar claim to *Y*, or to some other good such as *W*. That is true even of a Hohfeldian "liberty-right," whereby all that is being asked of others is that they have "no right" to prevent its exercise.[15] For such forbearance may itself be controversial, as in certain instances of someone exercising a liberty-right to do what might be commonly regarded as wrong.[16] Therefore, *X* and *Z* need to agree on rights and their respective correlative duties, or lack of them, in given situations. It is this need for a collective agreement on which rights we possess, when, and where, what their implications may be in a given case, how they interact with other rights, and which policies and procedures might be most suited to realizing them, that places rights within what Albert Weale and Jeremy Waldron have called the "circumstances of politics,"[17] because these are all matters on which we may reasonably disagree yet require a common decision, producing the need for a political mechanism of some kind to resolve our disputes.

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[13] *See, e.g.*, PETER JONES, RIGHTS: ISSUES IN POLITICAL THEORY 72–73 (1994); LOUGHLIN, *supra* note 7, at 114–130.

[14] *See* JONES, *supra* note 13, at 75–81.

[15] For a discussion of Hohfeld's classification of rights and of liberty rights in particular, see JONES, *supra* note 13, at 12–14, 17–22.

[16] *See* Jeremy Waldron, *A Right to do Wrong*, 92 ETHICS 21 (1981).

[17] WALDRON, *supra* note 4, at 107–13; ALBERT WEALE, DEMOCRACY 12–18 (2d ed. 2007).

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Theorists of natural and human rights have tended to assume away such disagreements. They have sought to ground their case for at least a set of basic rights on their "self-evident" character as dictates of reason, divine law, or essential elements of human well-being.[18] Yet, self-evidence "is not a very promising foundation for rights."[19] What leads us to identify specific features of human beings or human sociability as "natural," "basic," or "divinely ordained," depends ultimately on the moral theories we hold for which the specified capacities prove important. The upshot is that appeals to human nature and other supposedly "objective" and "universal" foundations of rights reflect rival ontological claims for which no generally agreed epistemology exists with the capacity to mediate between them. Even where there is agreement on the rather abstract set of general rights found in international human rights conventions or domestic bills of rights, there can be disagreement about what they involve in practice with regard to a given case.[20] These disagreements need not reflect self-interest or bad faith—although on occasion they clearly do so, as in the case of regimes whose reluctance to recognize rights results from their oppression of their subject populations. Rather, disagreements—such as one finds in most democratic countries—may simply issue from what Rawls has called "the burdens of judgment . . . the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life."[21] In Rawls's account, these burdens range from the different life experiences people bring to the assessment of a situation, to the multiple normative considerations likely to be involved, and the difficulties of relating them to the often complex empirical evidence. Although he believed these "burdens" only applied to conceptions of the good, they clearly also produce different understandings of the right. People may reasonably hold differing views of not only the sources and substance of rights, but also their subjects and scope, and how they might best be secured.[22] Thus, Nozickian libertarians, Ricardian socialists, Rawlsean social democrats, and Burkean conservatives all offer different accounts of the origins and extent of property rights and their relationship to other rights, which are expressed to different degrees, albeit usually in a less abstruse or sophisticated manner, in the everyday political debates of all mature democracies. At the level of principle, these disputes have not proved any more resolvable in the seminar rooms of philosophy departments than they have among policy makers and citizens.

[18] *See* JONES, *supra* note 13, at 96–97.

[19] JONES, *supra* note 13, at 97.

[20] *See* JONES, *supra* note 13, at 224–25.

[21] RAWLS, *supra* note 5, at 55–56.

[22] *See* Richard Bellamy, *Constitutive Citizenship Versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS 15, 15–39 (Tom Campbell et al. eds., 2001).

As I remarked, such reasonable, good faith, ontological and epistemological disagreements about the nature of rights mean that the determination of which rights we have and how they should be upheld requires a political process. However, not any kind of process will do if it is to be consistent with both the very idea of rights, as something possessed and claimable by all, and the reasonableness of these disagreements about them. The argument that best fits these two criteria would appear to be something like the fairness argument for democracy. According to this view, if the interests of individuals are equally affected by the overall decisions of the community to which they belong, and we follow J. S. Mill in regarding each individual as the best guardian of his or her own interest, then fairness dictates that they should all be able to play an equal part in the political process that makes those decisions.[23] On the one hand, decisions about rights are ones in which those affected will have an equal stake over the long term and taking into account the full range of decisions. So we need a process that will treat all as political equals in reaching mutually acceptable agreements such as a system of majority decision-making on the basis of equal votes offers. On the other hand, majority voting per se is not tied to any of the arguments; voters can vote for any position and for any reason. As such, it delivers a fair and neutral process for deciding which position can claim the most public support as being in the collective interest.[24]

This perspective reveals the preference for democracy is not purely pragmatic. It follows from the very idea of rights and certain structural features of any claim to a right and the disagreements that will surround it. First, although there are many different arguments for human rights, it is an intrinsic feature of all of them that since rights attach to human beings as such, they apply equally to all. Second, and related to the first, although rights connect to individuals, we have seen how they also have a collective dimension. A right is not claimed solely for the individual in question but as a right that can be held and upheld equally by all other individuals, hence the need for a process to collectively agree on the right. Moreover, for the right to be collectively held and upheld requires not just each individual doing his or her bit according to some commonly agreed norm, but also common, publicly provided, structures; at a minimum a legal system, and the means for law enforcement, such as a police force, courts, and prisons. So secured, rights function in many ways similarly to that which Raz has called an inherent public good;[25] that is, they promote common benefits that we must collectively produce through our attitudes to others and in which we can all equally share, a point to which I return below. Finally, we have noted how rights also operate as claims against those in authority. They imply that certain things should not be done or should not be denied to any individual.

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[23] *See* JONES, *supra* note 13, at 180.

[24] *See* Kenneth O. May, *A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952).

[25] JOSEPH RAZ, THE MORALITY OF FREEDOM 198–99 (1986).

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These three aspects of rights point towards a core claim that underpins all rights claims; namely, the claim by each individual to be treated as a political equal who owes and deserves equal concern and respect to and from every other individual in the shared arrangements that frame their social life, a claim that must also be acknowledged by the authorities charged with administering these arrangements. The intimate link between democracy and rights arises from this core claim. Democracy offers the only forum where different rights claims can be made and the collective structures necessary for their realization can be provided in a way that is consistent with rights claimants recognizing their fellow citizens, with their potentially rival claims, as deserving of equal concern and respect, and ensuring that the public authorities are responsive to their collective disagreements and deliberations about rights. Democracy offers a means for making decisions in which all meet as political equals to make reciprocal claims on each other when framing common policies, and can hold governments to account when they fail to reflect their preferences. In this way, the democratic process grants what Hannah Arendt termed the "right to have rights."[26] I am not thereby implying that all rights are intrinsic to democracy. As I noted above, not all rights relate to the democratic process. What I am arguing is that all rights involve a democratic form of justification; they imply a spirit of political equality to be accorded equal concern and respect that can only be achieved through a democratic process.

C. Rights and Individual Liberty: Liberal and Republican Perspectives

Seeing rights as somehow intrinsically democratic might be thought to subvert their "traditional political purpose;" that of telling "those who wield political power what they may and may not do."[27] For the chief advantage of rights in this respect has been held to lie in their having a basis outside of politics: They can perform the "basic tasks" of public law precisely because their foundations are distinct from the government authority that they are supposed to constitute, maintain, and regulate.[28] However, that perception arises from aligning that "traditional" understanding of the function of rights with the liberal conception of liberty as non-interference. By contrast, when that purpose is linked to the republican conception of liberty as non-domination—a view that more accurately accords with the nature of rights claims as delineated above—then democracy emerges as a necessary, even if not always sufficient, condition for its realization.

I. Liberalism, Rights, and Freedom as Non-Interference

[26] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296 (1973).

[27] JONES, *supra* note 13, at 222.

[28] *See* LOUGHLIN, *supra* note 7, at 1, 115.

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The liberal notion of freedom as non-interference seems to capture what many see as the central aspect of rights; namely, that there are certain things nobody should be allowed to do to another individual, such as torture, or prevent them from doing, such as exercising their freedom of speech. Given such rights only require the forbearance of others, they ought to be compossible—able to be held by all others—by their very nature, and so be non-negotiable because they do not require negotiation. Not all rights may be of this kind, but those that are offer some of the most important safeguards for individuals. On this account, there is no role for democracy to play in their formulation or maintenance; as noted above, they may even need to be exercised against democratic decisions.

Rights to non-interference seem the best candidates for being in some sense pre-political and, possibly, anti-political. Indeed, all law becomes inimical to rights in being a form of interference, albeit potentially necessary to render them secure. This approach offers the paradigm of the view of rights as trumps that are held by individuals against the collective. Such rights seek to drive a wedge between the right and any notion of the common good, offering preconditions for each and every individual to pursue his or her own good in his or her own way. Yet, even rights of this form cannot be isolated from the "circumstances of politics," for they will not be immune from disputes as to their definition, from conflicts between the uses of these rights by different people as well as with other rights, or from the need for the intervention of public laws and collective structures to realize them. All these issues prove political in the broad sense noted above. This is because they require a collective decision over the content and scope of these rights that will rest on value judgments concerning their purpose and nature—the public good or goods they serve—that allow for reasonable disagreement.

Thus, there may be agreement that no one should be tortured and all authorities and individuals should simply refrain from acts of torture, but interpretative disputes nevertheless exist as to whether certain punishments shade into torture or not. Think of the arguments in the United States over whether the death penalty is per se "cruel and unusual" or only certain methods for delivering it. It might be countered that although the practical meaning and implementation of this right are political, the right itself is not—it is a moral right that attaches to individuals as something one simply should not do to any person—hence the aforementioned agreement that torture is wrong. As I noted earlier, though, the moral force of even the most basic human rights does not follow from our humanity per se but the moral theory we hold, and people can and do have different views about the morality of torture, not all of which are rights-based. These differences will always prove relevant because the circumstances in which even a right such as this arises are always political to the extent that the claim is made against other persons and requires institutions or at least an agreement to be reliably enforced among them. There is no right of the individual as such, but only of the social individual within a political and legal

context.[29] Indeed, the historical origins of a right not to be tortured lie not in an absolutist view that this right ought to be upheld whatever the consequences, but because it was regarded as ineffective as a means for extracting evidence and corrupting of those who employed it. It was the general utility of torture as a means for upholding the rights of the public, rather than the right of an individual regardless of its impact on the public, that led to its abolition.[30] A political agreement on the public meaning and the good served by this right, as well as the best means to uphold it, are neither additional to or potentially at odds with the nature of such a right. They are essential to its definition and justification.

Similar debates arise in the case of free speech and whether incitement or libel count as speech. Here, though, there is the additional issue of how a right the exercise of which appears to simply involve forbearance can nonetheless clash with its similar exercise by others. We regard rights as important not simply for a single individual but for all individuals. If a right to free speech is to be collectively exercised we will need rules of order so we do not always all speak at once so that nobody can be heard above the cacophony, and there may be uses of that right that subvert other rights of individuals, as is the case with slander, hate speech, or the leaking of official secrets. Finally, such conflicts also mean that although many rights may appear simply to depend on an absence of interference, making them available to all will require intervention by public authorities to facilitate their use and guard against their abuse or subversion. It might be argued that we should simply seek to interfere as little as possible with the right in question so as to maximize its availability to all. Yet, what counts as interference is normatively laden,[31] as are the choices of what arrangements might enhance a right maximally in given circumstances. Some will regard certain omissions as well as acts as forms of interference, for example, or see threats and intimidation as potentially as inhibiting as physical force, others will not. Likewise, some might see an equal right as requiring no more than an equal chance to exercise it, such as might be achieved by a lottery, others that it be exercisable to an equal extent, with both views proving highly contestable even in their own terms, especially when it comes to establishing them in practice.

In collectively evaluating the nature and limits of rights and providing common means for their realization, as we have seen, the right comes to fall within, rather than being separate from and potentially opposed to and "trumping" the common or public good. For the rights that will be viewed as commanding the equal concern and respect of all citizens will be those that correspond to their commonly avowable interests and that, therefore,

[29] *See* Richard Bellamy, *Dirty Hands and White Gloves: Liberal Ideals and Real Politics*, 9 EUR. J. POL. THEORY 412, 416–20 (2010).

[30] *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press, 1995) (1764).

[31] *See* Onora O'Neill, *The Most Extensive Liberty*, 80 PROC. ARISTOTELIAN SOC'Y 45 (1979).

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provide an equal benefit to all. Indeed, not to align rights with the public good in this way has the perverse effect of making rights seem like the privileges of particular individuals rather than the universal entitlements of all citizens; an aristocratic rather than a democratic view. As Raz has noted with regard to free speech,[32] issues such as libel and slander make it implausible to see free speech as the right of each and every individual to say whatever he or she wants regardless of its more general effects on the rights of others. It also seems odd to suggest that we have an interest in this right for our own personal use as individuals in order to vent our frustrations in monologues delivered in front of the bathroom mirror, satisfying though this may be on occasion. It is also the case that few of us are likely to be opinion-formers or whistle-blowers either. So we do not necessarily have a personal interest in exercising this right ourselves. Rather, we all have an equal interest in the benefits of free debate and criticism of public policy by the comparatively small group of people with the time and expertise to do so—politicians, journalists, those with specialist knowledge in a given area, and so on—and in the possibility to join that group being equally open to all, including ourselves, should we feel motivated to do so. An equal right to free speech is thus instrumental to securing a public good—that of a free society in the sense, explored below, of being free from domination—rather than distinct from any such good. Hence, the common rules and structures that we favor for regulating free speech are those that we believe best serve that public purpose, for these are the rights all should and could have. Once such structures are in place, their role is to provide an equal and common benefit for all rather than a privilege for an individual to indiscriminately berate his or her neighbors or business rivals out of spite or for personal profit.

II. Republicanism, Rights, and Freedom as Non-Domination

Rights, then, cannot be removed from politics. Instead, we need a form of politics that is consistent with their character. As we saw at the end of the first section, rights involve a core claim to be treated with equal concern and respect, both by one's fellow citizens in the shared arrangements that coordinate social life and by the public authorities empowered to oversee them. Consequently, a political process for collectively claiming and deciding on rights will need to possess three key features. First, it must show equal respect for the different views of individuals as rights bearers. Second, it should also demonstrate equal concern for their capacity to employ their rights on the same terms as others. As such, it will need to be doubly collective, a process that involves all the public on an equal basis and promotes those rights and conceptions of rights that best reflect commonly avowed interests. Third, it will have to answer to the "traditional purpose" of rights as means for holding power to account and marking its limits.

Unlike the classic liberal view of freedom as non-interference, the republican notion of non-domination captures this core claim underlying rights by offering a normative basis for

[32] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 54 (1994).

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these three requirements of a justified rights-generating political process. On this account, freedom and rights belong not to an asocial agent outside all social and institutional arrangements and able to do what he or she wants because of the lack of interference with or by others, but rather is a civic achievement of socially situated individuals whose relations are regulated by law. What gives these legal arrangements their liberty-preserving quality lies in them being formulated by free and equal citizens who are not bound to any master, but who rather negotiate their collective arrangements together as political equals in order to arrive at policies that serve the common good rather than the partial and potentially dominating interests of particular powerful individuals or factions. The rights that arise from these arrangements reflect the ways in which citizens tell those in power what they may or may not do. Yet, citizens achieve that "traditional purpose" through claiming their rights through laws that apply equally to all—including their rulers—and which they ultimately control through a democratic process that shows each of them equal concern and respect as autonomous individuals.

Freedom as non-domination is not inimical to politics and law in the same way as freedom as non-interference.[33] Its aim is to achieve freedom from the arbitrary rule of a master rather than freedom from any rule. Rights play a part in that achievement, but they are the rights of citizens, not the natural rights of human beings that could be held either outside of any society, or as members of any society. Rather, they result from the laws that citizens give themselves as equal members of a polity.

The view of rights as existing outside and potentially against politics, and hence able to trump a democratic process, overlooks how rights are claims made by citizens on fellow citizens within a social and political setting. Two key errors flow from this oversight. First, it ignores the fact, explored above, that the rights claims of one individual impact on those of other individuals. As we have seen, rights do not attach to human beings as such within a putative state of nature. They belong to and reflect a given social context and the public goods it provides for those who exist within and support it. An individual claiming a right is not the only person possessing trumps. All those he or she is claiming against possess trumps too. The trumping metaphor ceases to be useful in this context. At best, one can argue that there are some especially weighty claims that individuals may have that need to be weighed in the balance with the similarly weighty claims of other individuals. Second, these trumps have already been played in the democratic process where we decide what rights the legal system should enshrine within the relevant legislation.[34] Legislators and, indirectly, those who have elected them can all express their views on rights in framing legislation, and seek to have their most basic interests and core views protected. All effectively play their trumps, but only on the same terms as everyone else. Therefore, in making a claim against a democratic decision, the rights claimer is illegitimately attempting

[33] *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51–79 (1997).

[34] *See* WALDRON, *supra* note 4, at 12.

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to play his or her cards again, and in the process is failing to treat his or her fellow citizens with the equal concern and respect rights demand.

What, though, do we do in the case of those who do not have access to any or to the relevant democratic institutions—who either live in non-democratic states or outside a given democratic state, be it as a stateless person or as a citizen of a different state—yet have a claim against the democratic decisions of a state that has adversely affected them? Surely, human rights claims often arise in their most powerful and urgent forms precisely in such situations, where either no democratic redress is available or democratic processes have ignored the interests of those excluded from them? Indeed, many established democratic systems have excluded certain members of the political community in the past—women, those without property, ethnic minorities, among other groups—and many continue to do so. All of this is undeniable. And yet, the claims such groups make can be seen primarily as claims for inclusion within the democratic community, to be treated as political equals.

Far from overlooking the claims of the excluded, the republican account has decisive advantages over the liberal in this regard, because the liberal view can be used by the privileged to mandate such exclusions to prevent unjustified interferences with their entitlements, be it the property rights of the rich or the sovereignty of wealthy states. By contrast, the republican view mandates inclusion as a political equal within the decision-making processes of those powerful bodies capable of exercising domination over our lives. These may be public bodies—the state or its agencies—or private bodies, such as large corporations or financial institutions. The liberal language of human or natural rights leaves the unprivileged outside the city walls, as mere petitioners for redress by the privileged within, who may deploy these same rights to deny any civic responsibility for these others. The republican approach brings all rights-claimants within the city walls, giving them access to the political mechanisms required to offer them redress. Yet, that brings the obligations as well as the privileges of citizenship, not least the duty to take the rights claims of others as seriously as they take their own. Unsurprisingly, the evidence shows that rights will only be reliably upheld where the democratic mechanisms exist for them to be claimed in this way, and that rights are just as reliably ignored and infringed where such mechanisms are absent.[35] It is to the specific virtues of actually existing democracy that we now turn.

D. Rights and Democracy: Real and Ideal

A number of rights theorists have acknowledged the democratic character of rights in framing their accounts in terms of an idealized democratic process, be it the rights that

[35] *See* Thomas Christiano, *An Instrumental Argument for a Human Right to Democracy*, 39 PHIL. & PUB. AFF. 142 (2011).

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must be presupposed by free and equal dialogue or discourse with another, or that would be agreed to, or could not be reasonably rejected in, circumstances where all participants are equally situated with regard to each other and none has power over another. This democratic argument for rights has been most explicitly stated by Jürgen Habermas.[36] Yet a parallel argument also informs John Rawls's *Political Liberalism,* where he characterizes his first principle of justice as reflecting an agreement between idealized citizens of a liberal democratic state on the necessary conditions for them to coexist as political equals.[37] However, this idealized democratic argument for the foundations of rights does not necessarily entail a practical commitment to use real democratic systems to uphold them. First, both Habermas and Rawls seek to distinguish constitutional from normal politics, regarding the more general and public debate they associate with the one as legitimately constraining and providing the norms underlying the other.[38] Second, both see constitutional courts as exemplifying a more ideal form of democratic discourse than real democratic processes. Habermas argues that courts can review democratic decisions on procedural grounds to ensure they have issued from a duly democratic process,[39] while Rawls maintains they may review them on substantive grounds as well to ensure that certain non-democratic rights have not been infringed, thereby removing certain rights from politics altogether.[40] Finally, and as a corollary of this last point, both see litigation as a form of democratic participation.

This section challenges and qualifies all three of these arguments. I shall argue that idealized court-based democracy is no substitute for real democracy. If political equality is necessary for all to be treated with equal concern and respect as both the claimers and the duty-bearers of rights within the circumstances of politics, then no purely ideal account of democracy can substitute for real democratic practices and participation. Such ideal theories risk being entirely circular, so construing the democratic process that it favors their preferred view of rights. Nor can any abstract theory be so specific as to incorporate all the features that figure within actual contexts, not least the very diverse life experiences and concerns of those involved.

I shall start by outlining the constitutional qualities of normal democratic politics. The superiority of real democratic systems over courts lies in their providing a mechanism for identifying the legislative embodiment of rights most likely to track the commonly avowed

[36] JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY ch. 10 (1998).

[37] RAWLS, *supra* note 5, at 3.

[38] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 304, 486 (William Rehg trans., 1996); RAWLS, *supra* note 5, at 232–33. For a critique, see BELLAMY, *supra* note 4, at ch.3.

[39] HABERMAS, *supra* note 38, at 263, 278–79.

[40] RAWLS, *supra* note 5, at 157, 161.

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interests of citizens by treating them with equal concern and respect. It achieves that result through providing a means for citizens to reach agreements in conditions of political equality. On this account, so-called normal politics is constitutional politics, for it allows the ongoing legislative enactment of rights in the democratic terms required to justify and legitimately realize rights claims. I then turn to an examination of courts and argue that far from offering a more ideal version of this process, courts lack the fundamental democratic quality of allowing an equal input from all affected citizens—their "right" to author their rights. Nor can their interpretation of a constitutional document that may at some stage have had democratic legitimation in a referendum be regarded as offering a democratic basis for their judgments, isolated as these are from the democratic views of current citizens Meanwhile, the distinction between procedural and substantive review proves hard to sustain. Not only are the rights inherent in a democratic process as contentious as those that lie outside it, with the latter (as I noted) often more basic and important than the former, but also judgments on what counts as due process turns to a considerable degree on views of the nature of an appropriate outcome. However, if the courts cannot provide a forum for what Pettit terms "authorial" democracy,[41] they can provide a venue for what he calls "editorial" or contestatory democracy for those groups that may not have had a voice in the democratic determination of the right. Litigation can play a democratic role here. However, such "editorial" democracy is necessarily weaker than, and subordinate to, "authorial" democracy; it offers the basis for a weak form of judicial review that can be overridden by the legislature.

I. The Authorial Merits of Real D emocracy

Democratic systems have undeniable defects and—although they can be improved—must always be expected to fall short of the ideal. However, much the same can be said of any human institution, including courts. So, in advocating courts as correctives for the mistakes of democratically elected and accountable executives and legislatures, it is necessary to bear in mind the mistakes that courts will also make. The key question has to be whether courts possess practical and normative qualities that render them more likely to uphold rights and to do so in more justified ways than democratic systems might do. In posing this question, I do not wish to deny that courts and democratic mechanisms have various complementary qualities, with each being best supplemented by the other—a point I return to later. However, their complementarity per se is not at issue here. Rather, the central point is which should have constitutional supremacy in defining whether rights have been upheld or not. Political systems, such as the United States, which have strong rights-based judicial review, hand over that decision to a supreme or constitutional court which can choose not to apply laws they believe infringe rights. But many other systems—such as the UK and Nordic countries like Finland and Norway—have traditionally had far

[41] Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 105 (Ian Shapiro & Stephen Macedo eds., 2000).

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weaker forms of judicial review and give more power on these matters to legislatures and special parliamentary committees. In what follows, I shall argue that the use of these legislative as opposed to judicial mechanisms for rights protection can be justified not just on pragmatic grounds but also for normative reasons to do with the democratic character of rights, for these normative arguments can never be embodied as fully in judicial practices as they are in legislative ones.

As I have argued elsewhere,[42] the key constitutional quality of actually existing democratic systems arises from their combining majority rule with a dynamic form of the balance of power that results from electoral competition between parties. This combination allows such systems to meet the requirement for political equality demanded of a republican notion of freedom as non-domination, thereby allowing rights to be considered in ways consistent with equal concern and respect, on the one side, and the blocking of arbitrary uses of power by those in government, on the other. Majority rule offers a fair decision procedure for resolving disagreements that gives all involved an equal voice, thereby satisfying the need for equal respect. Electoral competition in societies typified by cross-cutting cleavages, when the main policy differences can be plotted on a left–right continuum, obliges voters indirectly and politicians vying for power directly to "hear the other side," thereby meeting the requirement for equal concern. To build a majority, parties—or coalitions of parties—must bring together the preferences of as many different groupings among the electorate as possible. The result is that the rival party blocks tend to converge on the median voter, which usually represents the Condorcet winner on a pair-wise comparison of the various policy preferences of the electorate as a whole.[43] As research on the relationship of party manifestos to government policies has shown,[44] within democracies that have these characteristics there is a reasonably high correlation between the electoral campaign and the legislative program of the successful parties. Moreover, governments in such systems inevitably operate under the shadow of the forthcoming election, and so remain accountable to shifts in electoral opinion. They have an ever-present incentive to formulate polices that are non-arbitrary because they track public interests—those that will coincide with respecting the views of most citizens and addressing their common concerns as far as possible.

In this scenario, the prospects of any tyranny of the majority are low.[45] Those who lose consistently will be groups at the extremes of the political spectrum, who have failed to modify their views sufficiently to be able to link up with other sections of the electorate. It

[42] *See* BELLAMY, *supra* note 4, at 178–208.

[43] *See* PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION 245–57 (1986).

[44] *See* HANS-DIETER KLINGEMANN ET AL., PARTIES, POLICIES AND DEMOCRACY (1994).

[45] *See* Anthony J. McGann, *The Tyranny of the Super Majority: How Majority Rule Protects Minorities*, 16 J. THEORETICAL POL. 53 (2004).

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is not that their rights have been denied, for they have had the right to express their views on which rights ought to be available and in what ways.[46] Their opinions about rights and the interests that lie behind them have been treated on an equal basis to everyone else's. However, they have not managed to convince their fellow citizens that their view of rights would treat all those affected by its implementation with equal concern and respect, and that failure largely results from not heeding the equally important rights claims of a sufficient number of their fellow citizens, so that the costs and benefits of any collective policy on rights can be shown to be fairly shared by all.

This argument will not satisfy a rights theorist who holds that rights attach to individuals outside any social or political arrangements and should be respected regardless of their costs to others. However, the previous section showed this position to be self-defeating, because it involves a violation of rights itself. The justification of any rights claim needs to be on the grounds that it offers an equal recognition of the mutual rights claims of those others who will have the correlative duty to uphold it. Given disagreement about rights, the best available way of mediating between rival claims is via a fair process in which each person's views are treated on a par with everyone else's, and there is encouragement for all to accommodate the preferences of everyone else as far as they can. As we saw, such a process can be regarded as reflecting the democratic spirit that lies at the heart of any reasonable rights claim. It also provides a means for realizing freedom as non-domination, for it attempts to allow only those interferences that track common avowable interests; that is, those interests that can be avowed politically as showing those involved in a shared social scheme equal concern and respect through functioning as a public good in the sense discussed earlier. What I have now argued is that actual democratic systems offer a realistic approximation to such a rights-promoting process.

II. Courts as a Less than Ideal Democracy

Nevertheless, there will certainly be occasions when democratic mechanisms, either inadvertently or otherwise, do not treat all interests equitably or accommodate certain key concerns sufficiently. Certain persons affected by collective decisions may be excluded from the decision-making process altogether, or be ignored by others due to prejudice, or because they are too small and dispersed a group to have any hope of being able to organize themselves so as to be significant electorally. Voters may also act myopically or be misinformed. In any democratic system there is also the possibility that certain constituencies may prove to have disproportionate influence or others none at all, with the result that electoral decisions may register false positives or false negatives. In these situations, many have thought courts might offer a legitimate safeguard against democratic failures, not least because their processes can claim a certain democratic legitimacy of their own.

[46] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 159 (1999).

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Two related claims are made in this regard. First, it is claimed that courts, especially constitutional courts, employ a form of public reasoning and deliberation that is more truly democratic than a standard electoral process. Judges are not only trained to interpret the law impartially, so that it applies equally to all, but also are bound to justify their arguments in terms of constitutional rights norms that themselves reflect the upshot of an ideal democratic process—roughly speaking, the main liberal civil, political, and even certain socio-economic rights that anyone who accepted democracy would regard as necessary to secure participation as an equal within the public sphere broadly construed. The judiciary's independence from electoral pressures means it is less swayed by the need to pander to popular prejudices. Instead it can ask whether legislation could be regarded as consistent with a publically justified reading of these rights. As I noted, this argument may be interpreted in either a substantive manner, as relating to the outcome of democratic decisions,[47] or in a procedural manner, with regard to the processes by which democratic decisions are made.[48] Second, it is held that litigation is itself a form of participation. In particular, it allows legislation to be contested on the basis that it fails to meet the standards of equity and fairness inherent in democracy by giving those unable to get an adequate hearing in the regular political process a chance to voice their concerns.[49]

Both these claims for courts to offer a better and more ideal democratic forum for the authorship of rights than real democracy can be challenged. For a start, we have seen that constitutional rights norms can be subject to reasonable disagreements, especially when applied to particular cases. Given that the decisions of multi-member courts are often made on the basis of a majority vote, the judiciary can clearly disagree as much as the rest of the population. Yet, their disagreements need not be representative of, or responsive to, the electorate as a whole. That might be no bad thing if we had grounds for regarding their disagreements as somehow resulting from more "rights-responsive" reasons to those of the general public. But it is not obvious why that should be the case. The fact that they refer to rights in their reasoning does not of itself necessarily mean that their views of them are especially conscientious, better informed, or less biased than other people's. In fact, they may well be less so than politicians who, precisely because they need to engage with the views of the electorate, have to be aware of the impact of a particular way of interpreting and implementing rights on the lives and interests of those they represent. Each citizen's views may be partial, but the nature of the electoral contest makes politicians views rather less so as they have to appeal across the board. By contrast, the

[47] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1–38 (1996); RAWLS, *supra* note 5, at 212–54.

[48] *See* HABERMAS, *supra* note 38, at 238–86; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[49] *See* Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHIL. 451 (2003).

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danger is that the views of the judiciary are simply arbitrary from the public's perspective; they are merely the views of those individuals on the bench.

It will be objected that judicial reasoning is constrained by precedent and law. However, neither of these constraints per se can be regarded as necessarily producing a more objectively correct view of rights. If there were a clear methodology for arriving at the right answer on moral questions, then there would no longer be such disagreement about these issues, but no agreed method exists. At best, we have rival methods, each of which tends to exist in a circular relation to the view it wishes to promote. Meanwhile, not only is precedent a notoriously weak constraint—especially when dealing with hard or novel cases of the kinds that typically give rise to judicial review—but it may also, insofar as it does apply, provide inappropriate constraints. If courts are tied by precedent, then that implies a *status quo* bias that hinders those cases that might rightly challenge previous decisions. Likewise, the only parties and considerations a court can consider are those that have legal standing in the case at hand. But when deciding public policy it is often necessary to consider the knock-on effects for a wide range of seemingly unrelated policies. Moreover, not all the relevant moral issues involved need be best articulated in terms of rights. Indeed, exclusive focus on the way a right has been legally defined may subvert a full discussion of the question at hand. Think of the distorting effect of arguments about the right to free speech that focus on whether a given form of expression can be characterized as "speech" or not.

Some theorists have argued that these difficulties can be overcome by a procedural approach to judicial review.[50] As Habermas puts it, "a constitutional court guided by a proceduralist understanding of the constitution does not have to draw on its legitimation credit"; it can leave the substance of rights to a democratic process and confine its views to simply adjudicating on whether democratic decisions respect the "logic of argumentation."[51] Yet, he defines valid procedures in terms of "the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation."[52] A "consistent proceduralist understanding of the constitution relies on the intrinsically rational character of a democratic process that grounds the presumption of rational outcomes."[53] In other words, the test for judging the rationality and appropriateness of a given democratic procedure rests on whether it produces rational outcomes. This argument simply undermines the procedural-substantive distinction. As with other rights, rights related to the democratic process need to be claimed and reformed within existing, normal democratic politics. For example, it is through such

[50] *See, e.g.*, ELY, *supra* note 48.

[51] HABERMAS, *supra* note 38, at 279.

[52] *Id.* at 278–79.

[53] *Id.* at 285.

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mechanisms that the workers and women gained the right to vote in the United Kingdom, that forms of proportional representation were introduced in New Zealand and in the UK for regional and European elections, and so on. Compare these dramatic and progressive changes to the blocking of similar measures in the United States by successive judgments of the Supreme Court.[54]

What about the alleged potential of litigation as an additional forum for democratic participation and contestation? This argument also fails, in part for reasons related to those presented earlier. Litigation will only be possible for those parties that the court views as having a case in law. So it is a restricted forum, the terms of which are controlled by the court. As we saw, these controls may be such as to hinder rather than facilitate new or hitherto excluded voices getting heard. Then there are the resource problems of going to court. Access to justice is costly and time-consuming, and cases can take years to be heard. This can often favor those with deep pockets. Given that all citizens start with an equal vote, there is the danger that courts enable illegitimate double counting, with those who cannot muster sufficient popular support to win in politics shopping in an alternative forum that is less open and hence more favorable to the position of privileged minorities or sectional interests.

As a result of these defects, courts, like legislatures, can register false negatives and positives.[55] But this practical weakness is not entirely symmetrical to that found in political processes. Although those who go to court may be treated equally with regard to the law, by contrast to the political system they cannot claim their rights to equal concern and respect on their own terms as political equals. The terms whereby they get access to the law are always the law's, and in these sorts of cases the tribunal they must address is not one of their peers but the judiciary who are set above them as those who determine the state of the law on the case in question. The difficulty lies in the fact that the very constraints needed to give individuals a fair trial under the law by impartial judges can also make courts inappropriate forums for considering the public good aspects of rights and ensuring that their judgments show equal concern and respect to all those not represented within them. The insistence on legality, on the one side, and independence from extraneous influences, on the other, aim to ensure judges make decisions as far as possible free from personal bias, financial inducements or fear of reprisals from those sympathetic to one or other of the parties. Yet, the common good aspects of rights may involve considerations beyond the law in question and require a responsiveness to the consequences for the public at large. Courts engaged in rights-based review typically deal with such questions under the heading of "proportionality." Yet, unlike legislatures they

[54] *See* BELLAMY, *supra* note 4, at 107–29.

[55] *See* Richard Bellamy, *The Republic of Reasons: Public Reasoning, Depoliticization, and Non-Domination*, *in* LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES 102, 102–20 (Samantha Besson & José Luis Martí eds., 2009).

lack the feedback mechanisms likely to ensure such judgments are well-informed. Governments have to respond to the votes of millions of citizens and their assorted needs by presenting them with a program of government and have both the opposition and several hundred representatives seeking reelection from their diverse constituencies to remind them of that fact. For good reasons, courts are isolated from such pressures.

III. Courts and Editorial Democracy

It will be pointed out that not all litigants in human rights cases are tobacco companies contesting restrictions on advertising in the name of free speech, or film stars protecting their ability to sell their wedding photos to the highest bidder in the name of privacy. There are also asylum seekers, prisoners, the mentally ill, immigrants, and other unpopular or isolated minority groups, with limited if any access to the democratic sphere. Even if not all deserving cases get to court. and not all those that do are decided well, there is at least the prospect that some of those individuals whose rights will go unregarded otherwise will get a hearing. For these cases, courts can offer a legitimate avenue of contestatory democracy. While the constraints typical of courts make them a poor authorial forum, they prove well suited as supports for an editorial forum. Courts seek in their own proceedings to ensure that litigants are treated impartially with regard to the settled norms of the law. In doing so, they apply notions of equity and procedural fairness. As a result, they are highly attuned to adjudicating on the issue of whether a given party to a dispute has been given an adequate hearing, or if the norms governing a case have been interpreted even-handedly to all parties. In cases where a litigant, such as an asylum seeker or a prisoner, could show that his or her position had failed to be treated equitably in either of these ways, then contestation of the authorial decision seems legitimate with the courts the appropriate forum. The issue then becomes how strong can such contestation be before it merges into a less legitimate form of authorial democracy?

Some accounts of editorial democracy, such as Pettit's—at least in some formulations—see a written constitution and bill of rights as offering the authorial basis for such editorial contestation.[56] However, that overlooks the fact that the electoral branch may have claimed to offer these as much attention as the judicial, and sought to legitimately reinterpret them so that they accorded more truly with the current views and interests of people with regard to certain issues. If a court is allowed, as under strong contestatory review, to strike down legislation or to read into it its own reading of its fit with constitutional norms, then it is in effect usurping the authorial function of electoral democracy. By contrast, a weak form of contestation allows courts merely to question the compatibility on the fairness grounds outlined above and to force a reconsideration by the legislature. In many respects, the British Human Rights Act can be read in such terms as a

[56] *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163 (Ian Shapiro & Casiano Haker-Cordón eds. 1999); Pettit, *supra* note 41.

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form of "weak" contestatory judicial review.[57] Under this scheme, the rights enumerated under the Act remain an ordinary piece of legislation that the electoral branch can alter if it deems that necessary. However, in the meantime, it seeks to ensure its current legislation is compatible with such rights norms and to mark when it seeks, for reasons it deems legitimate, to depart from them. Yet, courts can dispute whether it has done this sufficiently thoroughly and ask the legislature to reconsider, although how and when remains the prerogative of the authorial branch of democracy. Here democracy—real democracy—remains the authorial foundation for rights, with the courts offering a supplementary function as an editorial alarm bell.

E. Conclusion

I have argued that rights involve an implicit appeal to democratic forms of public reasoning. Nevertheless, this view can still capture "the traditional political purpose of natural or human or fundamental rights," which accords with the "basic tasks" of public law, that of constraining those wielding political power. This purpose and these tasks are best conceived in terms of the republican view of liberty as non-domination rather than the liberal view of liberty as non-interference. On this account, the state pursues public purposes that accord with rights to the extent it is under the ultimate control of the public by way of democratic mechanisms that show them equal concern and respect. It follows that constitutional rights cannot offer a higher public law that defines and circumscribes the public realm, its officials, and ultimately the public themselves, with public reason not the reasoning of the public but that of courts applying norms that lie outside of politics.

The justifiable authorial foundation of rights must be some form of ongoing democratic decision-making that allows rights to be claimed under conditions of political equality. At best, courts provide the basis for a weak form of contestatory or "editorial" democracy that draws attention to neglected or otherwise unheard voices among the public. However, the only legitimate final say on rights rests with the people, upon whom the benefits and burdens of rights must equally fall as commonly avowed goods that serve their shared interests. In summary, rights and law in general will only be truly public to the extent that they are the law and rights that the members of the public give to themselves.

[57] *See* Bellamy, *supra* note 12.

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