

# Rights as Democracy

Richard Bellamy\*

*Department of Political Science, School of Public Policy, UCL, London, WC1H 9QU, UK*

Like many rights theorists, Peter Jones regards rights as lying outside politics and providing constraints upon it. However, he also concedes that rights are matters of reasonable disagreement and that, as a matter of fairness, disputes about them ought to be resolved democratically. In this paper I develop these concessions to argue that rights require democratic justification and that this can only be provided via a real democratic process in which those involved 'hear the other side'. I relate this argument to the republican theory of non-domination, contending that it fits the Lockean project of regarding rights as constraints on arbitrary power better than liberal views that place rights outside the democratic process. I conclude by noting the implications of this argument for rights-based judicial review of legislation.

**Keywords:** rights, liberalism, republicanism, democracy, judicial review

## Introduction

In his study of *Rights* (Jones 1994), Peter Jones takes a broadly liberal view whereby rights stand apart from, and are potentially in tension with, democracy. Although certain rights may be intrinsic to democracy, such as the right to vote, he correctly notes that most rights – among them many of the most important, such as the right not to be tortured - are not (Jones 1994: 173-74). Moreover, given that a tyrannous, or simply a myopic or misguided, majority might democratically vote to allow torture or other rights violations against vulnerable minorities, it may on occasion be necessary to limit democracy to protect rights. Indeed, he argues that even intrinsically democratic rights might need safeguarding against a majority that had, for one reason or another, come to embrace anti-democratic preferences (Jones 1994: 175). As for a right to democracy, he regards such a notion as incoherent given that citizens could reasonably opt for non-democratic arrangements that might protect rights just as well as democratic processes but require fewer commitments or less participation on their part. In fact, partly for the reasons already given, such non-democratic mechanisms might in

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\* E mail r.bellamy@ucl.ac.uk

some cases offer superior and more efficient means for promoting people's rights and other interests (Jones 1994: 188). In his view, all these caveats to linking rights to democracy reflect 'the traditional political purpose of natural or human or fundamental rights': namely, 'to tell those who wield political power what they may and may not do' (Jones 1994: 222).

In what follows, I shall contest almost all of these arguments, at least in so far as they apply to established democratic systems. However, I shall do so in part for some of the positive reasons Jones concedes may nonetheless connect rights to democracy – at least contingently. Two of these prove particularly important for my purposes. The first reason concerns the linking of democracy with a concern for fairness. Jones summarises this position as follows. Taken overall, the decisions of any given political community are likely to have an equal impact on the interests of the individuals who comprise it, giving each of them an equal stake in the political process. If we accept that no individual's well-being is more important than that of any other, and - following J. S. Mill – view each individual as the best guardian of his or her own interests, then democracy will offer the most justified form of decision-making. For 'if individuals interests are equally at stake in a political process, those individuals as a matter of fairness, have a right to play an equal part in that process to ensure their interests are taken equally into account' (Jones 1994: 180) .

The second reason arises from Jones's concession that rights are subject to disagreement. As he notes, such disputes are not unique to rights but affect all moral thinking to some degree. Typically, following the fairness argument outlined above, we view democracy as offering a legitimate resolution of such disagreements by giving equal weighting to diverse views and producing a decision from them. Yet, Jones believes 'that way of dealing with dissensus is not uncomplicatedly available to the more ambitious aspirations for rights' (Jones 1994: 222). If a prime purpose of rights is to constrain the exercise of power so that it does not infringe certain basic entitlements of all human beings, then it seems inconsistent to place such rights within the very political processes they may need to limit. However, as Jones grants, if the content of rights is disputed, then the attempt to impose a particular version of rights from outside such a process will itself 'seem little more than an exercise of power by some over others' (Jones 1994: 223). We appear to face a practical dilemma, therefore, whereby 'the greater the dissensus about rights, the more practically difficult it will be to establish them as fundamental entitlements which constrain what a society and its government may do' (Jones 1994: 223). Nevertheless, he believes that 'we should not exaggerate the reality of this difficulty' (Jones 1994: 223). After all, international conventions on rights exist that can claim the formal adherence of almost all

states, while most democracies have domestic bills of rights. He contends these statements of rights command sufficient consensus and, despite their generality and abstractness, are sufficiently action guiding, to allow non-majoritarian bodies, such as courts, to secure their application outside – and occasionally against – the ordinary democratic political process (Jones 1994: 223-24). Yet, he admits that general bills of rights still ‘leave large areas of discretion open to whoever interprets them and that their interpretation involves judgements of a moral and political rather than a strictly technical nature’ (Jones 1994: 225). As a result, he allows that such issues might, as some rights proponents believe, remain better and more appropriately dealt with by democratic politicians than by unelected judges. Advocates of this view still maintain that ‘rights should remain special, but their specialness should be felt in the way they are handled by politicians rather than in their not being handled by politicians’ (Jones 1994: 225).

Jones treats the pros and cons of a democratic as opposed to the judicial resolution of disagreements about rights as largely an empirical and prudential matter. I disagree. I shall argue that the importance of resolving them democratically follows from not only the fairness argument he outlines (but does not ultimately support) for a right to democracy, but also the very nature of rights and the claims we make of others with regard to them. Although not all rights are intrinsic to democracy, I shall argue we assert them most legitimately when we do so in what might be called a democratic spirit: that is, as claims to be treated with equal concern and respect as autonomous individuals within a shared set of collective arrangements.

Rights so conceived can be related to the neo-Roman republican notion of liberty as non-domination as defined by Pettit (1997) and Skinner (1998). Like other recent liberal theorists of rights (notably Dworkin e.g. 1996: ‘Introduction’), Jones tends to see at least those rights deserving constitutional protection as best conceived in terms of a right to non-interference by others. That view favours a conception of rights as trumps. However, I shall argue that such a position proves unsustainable. Rights claims will only show citizens equal respect if their views have been equally considered, and only achieve equal concern through collective arrangements that can be shown to track their common recognisable interests – that is, the interests that members of a shared scheme that aspires to treat all as equals could publically avow as being owed to all (Pettit 1999, p. 176). Both these criteria are defining features of liberty as ‘non-domination’ (e.g. Pettit 1997, p. 56). Both these desiderata also point to something akin to the fairness argument for democracy (Bellamy 2007, pp. 159-75). From this perspective, the link between democracy and rights ceases to be a largely

contingent and empirical matter and is rather an inherent feature of their very nature. It establishes not so much a right to democracy as a view of democracy as the foundation of rights. Moreover, this foundation does not consist of some ideal theoretical conception of democracy that might be detachable in practice from an actual democratic process. It requires that rights be proposed and pursued through recognisably democratic procedures that conform to a reasonable condition of political equality.

The argument proceeds as follows. I start by showing how the very nature of a rights claim implies a democratic process in which citizens have the status of political equals when formulating collective decisions that are to apply equally to all. I then relate this democratic argument for rights to the republican conception of liberty as non-domination, rejecting along the way the liberal account of rights as trumps and its origins in a view of freedom as non-interference. Finally, I explore how this association of rights and democracy exists not simply at an ideal level but needs to be actualised within a real democratic process of a kind akin to the systems of actually existing democracies, with their combination of one person one vote, majority rule, and regular elections between competitive parties. Moreover, the normative and logical status of rights as intrinsically democratic in their mode of justification and application greatly circumscribes the legitimacy of using judicial and other non- or counter-majoritarian mechanisms to uphold rights against democracy (Bellamy 2007).

### **Rights, Political Equality and Democracy**

Jones remarks how 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 (Jones 1994, pp. 73-3). 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 realised within and upheld by all polities. As such, they define the boundaries, foundations and to some extent the goals of politics (Jones 1994, pp. 75-81).

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 relation, whereby x has a right to some y. That gives

rights a somewhat peremptory sounding character. However, rights are always a three term relation, whereby x asks some z to recognise and respect his or her claim to y, with attendant costs and benefits to z who will wish x to likewise recognise either his or her similar claim to y, or to some other good such as v. 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 (see Jones 1994, pp. 12-14, 17-22 for a discussion of Hohfeld’s classification of rights and of liberty rights in particular).. 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 (Waldron 1981). 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 realising them, that places rights within what Albert Weale and Jeremy Waldron have called the ‘circumstances of politics’ (Weale 2007, pp. 12-18; Waldron, 1999, pp. 107-13). For, these are all matters on which we may reasonably disagree yet need a common decision, producing the need for a political mechanism of some kind to resolve our disputes.

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 (Jones 1994, pp 96-97). Yet, as Jones notes, self-evidence ‘is not a very promising foundation for rights’ (Jones 1994, p. 97). What leads us to identify specific features of human beings or human sociability as ‘natural’, ‘basic’ or ‘divinely ordained’ depend 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. As Jones concedes, 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 (Jones 1994, pp 224-5). These disagreements need not reflect self-interest or bad faith – though on occasion they clearly do so, as in the case of regimes whose reluctance to recognise 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 judgement ... the many hazards involved in the correct (and conscientious) exercise of our

powers of reason and judgement in the ordinary course of political life' (Rawls 1993: 55-56). On 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 (Bellamy 2001). 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.

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. In these respects, the fairness argument Jones gives for democracy provides a basis for regarding the democratic process as the most legitimate political procedure for constructing the necessary collective agreement. 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 majoritarian decision-making on the basis of equal votes offers. On the other hand, majoritarian 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 (May, 1952).

So conceived, the choice of democracy is not, as Jones suggests, 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, though 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 relatedly, although rights connect to individuals

we have seen how they 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, prisons. So secured, rights function in many ways like what Raz has called an inherent public good (Raz 1986, pp. 198-9): 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.

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. For, democracy offers the only forum where different rights claims can be made and the collective structures necessary for their realisation can be provided in a way that is consistent with rights claimants recognising 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’. 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.

### **Rights and Individual Liberty: Liberal and Republican Perspectives**

Seeing rights as somehow intrinsically democratic might be thought to subvert their aforementioned ‘traditional political purpose’ as identified by Jones, that of telling ‘those

who wield political power what they may and may not do' (Jones 1994, p. 222). 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 a sufficient, condition for its realisation. Moreover, whereas Jones aligns the liberal view of natural rights in the 'strong' anti-political sense with Locke (Jones 1994, pp. 72, 75) it is the republican tradition that is arguably closer to the 'Lockean' programme (Pettit 1997, p. 40).

### Liberalism, Rights and Freedom as Non-Interference

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 not requiring 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- 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 collectivity. Such rights seek to drive a wedge between the right and any notion of the common good, offering pre-conditions for each and every individual to pursue his or her own good in their 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 realise them. All these issues prove political in the broad sense noted above. For, they require a collective decision over the content and scope of these rights that will rest on value judgements 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 doing so, 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 though 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 above, 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 is 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 (Bellamy 2010, pp. 416-20). 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 (Beccaria [1764] 1995). 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 nor 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’ in the legally acceptable sense.<sup>1</sup> These involve uses of the right to free speech that potentially subvert other rights of individuals, as is the case with slander, hate speech or the leaking of official secrets. Such conflicts indicate that though 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 maximise its availability to all. Yet, what counts as interference is normatively laden (O’Neill 1979/80), as are the choices of what arrangements might maximally enhance a right 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 realisation, as we have seen is necessary, the right comes to fall within, rather 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 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 (Raz 1994, p. 54), 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, say 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 rather than distinct from any such good. Hence, the common rules and structures that we favour 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 neighbours or business rivals out of spite or for personal profit.

### 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 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 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 still 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 (Pettit 1997, ch. 2). 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. Arguably, this

republican position fits the Lockean project rather better than the liberal account. Jones characterises the Lockean tradition as committed to the upholding of natural rights as the primary task of government. In that case, though, Locke would have regarded law as a constraint on rights, to be kept to the minimum necessary to secure them. However, that is not his view (Pettit 1997, p. 40). As Locke noted, ‘freedom from Absolute, Arbitrary power’ is the goal of a good polity, with law an essential part of that given ‘that ill deserves the Name of Confinement which serves to hedge us in only from Bogs and Precipices ... the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom’ (Locke 1965 [1681] 325, 348). True, Locke does mix this republican language with jurisprudential natural rights thinking. However, as these quotes suggest, he is perhaps best read not as using rights as fundamental norms in the liberal, deontological sense - except perhaps for rhetorical reasons - but as legal norms that arise from and promote freedom as non-domination (Pettit 101).

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 he 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 (Waldron 1999, p. 12). 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 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.<sup>2</sup>

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 decided advantages over the liberal in this regard. For 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 self-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 (Christiano 2011). It is to the specific virtues of actually existing democracy that we now turn.

### **Rights and Democracy: Real and Ideal**

A number of theorists have acknowledged the democratic character of rights in framing their accounts in terms of an idealised democratic process – be it the rights that must be presupposed by free and equal dialogue or discourse with another, or those 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 (e.g. Habermas 1998, ch. 10). Yet a parallel argument also informs John Rawls's *Political Liberalism*, where he characterises his first principle of justice as reflecting an agreement between idealised citizens of a liberal democratic state as the necessary conditions for them to co-exist as political equals (Rawls 1993, p. 3). However, this idealised 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 (Habermas 1996, pp. 304, 486; Rawls 1993, pp. 232-33 – for a critique see Bellamy 2007, ch. 3). 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 (Habermas 1996, pp. 263, 278-9), 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 (Rawls 1993, pp. 157, 161). 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 idealised, 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, construing the democratic process so that it favours 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 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 on-going legislative enactment of rights in the democratic terms required to justify and legitimately

realise 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 the current citizenry. Meanwhile, the distinction between procedural and substantive review proves hard to sustain. Not only are the rights inherent to 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 judgements on what counts as a due process turn 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 (Pettit 2000), they can provide a venue for what he calls ‘editorial’ or contestatory democracy for those groups that may not have had 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.

### The Authorial Merits of Real Democracy

Democratic systems have undeniable defects and though 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 they 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 below. 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 disapply laws they believe infringe rights. But many other systems – such as the UK and Nordic countries like Finland and Norway – have traditionally had far 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 (Bellamy 2007, ch. 6), 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, and where 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. For, 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 (Ordeshook 1986, pp. 245-57). As research on the relationship of party manifestos to government policies has shown (Klingermann, Hofferbert, and Budge, I. 1994), within democracies that have these characteristics there is a reasonably high correlation between the electoral campaign and the legislative programme of the successful parties. Moreover, governments in such systems inevitably operate under the shadow of the coming election, and so remain accountable to shifts in electoral opinion. They have an ever present incentive to formulate policies 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 (McGann 2004). 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 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 (Tushnett 1999: 159). 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 of 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, since 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 is treated on a par with everyone else's and there is encouragement for all to accommodate the preferences of everyone else so 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 realising 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 mentioned earlier. What I have now argued is that actual democratic systems offer a realistic approximation to such a rights promoting process.

### Courts as Unreal 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 organise themselves so as to be electorally significant. Electorates 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.

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 apply 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 up shot of an ideal democratic process – the norms – roughly speaking the main liberal civil and 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 they are less swayed by the need to pander to popular prejudices. Instead they 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 (Rawls 1993, Lecture VI; Dworkin 1996, ‘Introduction’), or in a procedural manner, with regard to the processes by which democratic decisions are made (Ely 1980, Habermas 1996, ch 6). 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 to democracy by giving those unable to get an adequate hearing in the regular political process a chance to voice their concerns (Kavanagh 2003).

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 multimember 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 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 also it and legal reasoning more generally may in so far as they do apply be 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 characterised as ‘speech’ or not.

Some theorists have argued that these difficulties can be overcome by a procedural approach to judicial review (Ely 1980). As Habermas puts it, ‘a constitutional court guided by a proceduralist understanding of the constitution does not have to draw on its legitimisation 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’ (Habermas 1996, p. 279). 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’ (Habermas 1996, pp. 278-9). A ‘consistent proceduralist understanding of the constitution relies on the intrinsically rational character of a democratic process that grounds the presumption of rational outcomes.’ (Habermas 1996, p. 285). 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 mechanisms 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 (for details see Bellamy 2007, pp. 107-29).

What about the potential of litigation as an additional forum for democratic participation and contestation? Partly for related reasons, it may fail or be worse in this respect too. 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. That can often favour 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 favourable to the position of privileged minorities or sectional interests.

As a result of these defects courts, like legislatures, can register false negatives and positives as well as legislatures (Bellamy 2009). But this practical weakness is not entirely symmetrical to that found in political processes. Though those who get 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 very constraints needed to give individuals a fair trial under the law by impartial judges can make courts inappropriate forums for considering the public good aspects of rights and ensuring that they 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. Court's engaged in rights-based review typically deal with such questions under the heading of 'proportionality'. Yet unlike legislatures they 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 programme of government and have both the opposition and several hundred representatives seeking re-election from their diverse constituencies to remind them of that fact. For good reasons, courts are isolated from such pressures.

### 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 so 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 an 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 (Pettit 1999, 2000). 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 form of ‘weak’ contestatory judicial review (Bellamy 2011). 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 – though 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.

### **Conclusion**

Jones sees rights as distinct from and potentially constraints upon politics. They are means for preventing illegitimate interferences with individual liberty. Democracy offers at best the most appropriate mechanism for upholding them. But that is only because of the empirical flaws of the alternatives and of our reasoning about rights, not due to the very nature of rights themselves. By contrast, I have argued that rights involve an implicit appeal to democratic forms of reasoning. Moreover, this inherently democratic character of rights is best captured by a republican view of liberty as non-domination, rather than the standard liberal account of liberty as non interference. Nevertheless, this republican view can still capture ‘the traditional political purpose of natural or human or fundamental rights’, and arguably offers a more accurate account of the ‘Lockean’ programme than the liberal’s. Nor is this account simply an ideal view of the relations between rights and democracy, that itself has only a pragmatic relation to actually existing democratic processes. The only justifiable authorial foundation of rights must be some form of on-going 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. However, the only legitimate final say on rights rests with the people themselves, among whom the benefits and burdens of rights must equally fall as commonly avowed goods that serve their shared interests.

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### **Note on Contributor**

Richard Bellamy is Professor of Political Science and Director of the European Institute, University College London (UCL), University of London. Recent publications include *Liberalism and Pluralism: Towards a Politics of Compromise* (Routledge, 1999), *Rethinking Liberalism* (Continuum, 2000, 2005), *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) and *Citizenship: A Very Short Introduction* (Oxford University Press, 2008).

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<sup>1</sup> There is the additional issue of how a right the exercise of which appears simply to involve forbearance can nonetheless clash with its similar exercise by others. We regard rights as important not just for a single individual but also 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 no body can be heard above the cacophony. Of course, this point does not generalise to publishing or the media, which are the most important cases of free speech today, but it is a difficulty with the exercise of certain other rights, as when a successful entrepreneur gains a monopoly through the exercise of free market rights that may inhibit their future exercise by others.

<sup>2</sup> It could be argued that all can also have resort to law on an equal basis to everyone else. However, access to courts not only tends to be more restricted and costly than the exercise of a vote, courts also offer a narrower forum. The only parties that have standing are those that have standing in law, so that a much narrower range of considerations are debated. If the aim is to justify rights in public terms as reflecting common avowable interests, then the judicial arena cannot achieve this. At best, it allows citizens to argue that their commonly avowed interests have not been considered appropriately in the legislation – a contestatory purpose that I explore in the next section, but which does not justify a strike down power on the part of the courts. I have discussed these points at length in Bellamy 2007: Ch. 1.