XV*—PARTICIPATION: THE RIGHT OF RIGHTS

by Jeremy Waldron

ABSTRACT This paper examines the role of political participation in a theory of rights. If political participation is a right, how does it stand in relation to other rights about which the participants may be making political decisions? Suppose a majority of citizens vote in favour of some limit on (say) the free exercise of religion. If their decision is allowed to stand, does that mean that we are giving more weight to the right to participate than to the right to religious freedom? In this paper, I argue that talk of conflict (and relative weightings) of rights is inappropriate in a case like this. I argue that the special role of participation in a theory of rights is not a matter of its being given moral priority over other rights. Instead it's a matter of this being a right whose exercise seems peculiarly appropriate, from a rights-based point of view, in situations where reasonable right-bearers disagree about what (other) rights they have.

I

'The great right of every man', said William Cobbett, 'the right of rights, is the right of having a share in the making of the laws, to which the good of the whole makes it his duty to submit.'[1] What sort of right is this? How is it justified? And how important is it in relation to other rights? Cobbett called it 'the right of rights', a phrase which when read carelessly might suggest that participation is more important than the other rights with which it might conflict. For example: exercising their right to political participation, the members of a majority vote in favour of some limit on (say) the free exercise of religion; if participation is the right of rights, it looks as though the right to religious freedom is going to have to give way, in cases like this, in order to vindicate the right of participation. In this paper, however, I shall argue that talk of conflict of rights is inappropriate in this sort of case. I shall argue that the special role of participation in a theory of rights is not a matter of its having moral priority over other rights. Instead

1. William Cobbett, from *Advice to Young Men and Women, Advice to a Citizen* (1829), quoted in L.J. MacFarlane, *The Theory and Practice of Human Rights* (London: Maurice Temple Smith, 1985), p. 142.

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it's a matter of this being a right whose exercise seems peculiarly appropriate in situations where reasonable right-bearers disagree about what rights they have.

II

To begin with, what sort of right is this 'right of having a share in the making of the laws'? Karl Marx distinguished famously between the rights of man and the rights of the citizen. The rights of man—such as property, security and religious liberty—are 'nothing but the rights of... egoistic man, man separated from other men and the community'. But the rights of the citizen—voting, eligibility for office, and the freedom to discuss and criticize the conduct of public affairs—are quite unlike the traditional rights of man. The rights of the citizen, far from being atomistic, are 'political rights that are only exercised in community with other men.'[2]

The point is undeniable: one cannot understand political rights in terms of the drawing of boundaries around autonomous individuals;[3] they are to be understood instead as establishing a basis on which large numbers of right-bearers act together to control and govern their common affairs. Certainly, it would be a mistake to regard political participation as a merely 'negative' right, protecting people from interference. The distinction between positive and negative rights—that is, between a right correlative to another's duty to actually *do something* for the right-bearer's benefit and a right correlative to another's duty to *refrain from doing something* that interferes with the right-bearer's freedom—is arguably unhelpful anyway. It has all the difficulties of the philosophers' distinction between acts and omissions. It faces the additional difficulty that a given right is usually correlative not to single duties but to arrays of duties, some of them duties of omission, others duties of action.[4] And it is particularly unhelpful in the case of political rights.

2. Karl Marx, 'On the Jewish Question', in Jeremy Waldron (ed.) *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1988), pp. 144–6.

3. Or 'hyper-planes in moral space', or whatever other nerdy jargon we use: Cf. Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), p. 57.

4. See Jeremy Waldron, 'Rights in Conflict' *Ethics*, 99 (1989), 503-19, reprinted in *Liberal Rights: Collected Papers 1981–91* (Cambridge: Cambridge University Press, 1993).

We can see this if we consider Maurice Cranston's use of the distinction in his attack on the inclusion of 'economic and social' principles in the 1948 Universal Declaration of Human Rights:

> The traditional 'political and civil rights' can... be readily secured by legislation; and generally they can be secured by fairly simple legislation. Since those rights are for the most part rights against government interference with a man's activities, a large part of the legislation needed has to do no more than restrain the government's own executive arm. This is no longer the case when we turn to 'the right to work', 'the right to social security', and so forth.[5]

Whatever the case with civil rights such as religious freedom, *political* rights certainly cannot be secured by legislation that does 'no more than restrain the government's own executive arm'. The right to vote is not a matter of negative freedom to express a preference for one's favourite politician, and it is not secured by the individual's simply being left alone by the state to do this when he pleases. One has the right to vote only if one's vote is counted and given effect in a system of collective decision that determines policy, leadership and authority. To vote is to exercise a Hohfeldian *power*[6] (albeit a heavily conditional power): it is to perform an action which (if enough others also perform it) alters the assignment of rights and duties in the community. (It is more like executing a power of attorney than like making a speech.) Respect for such a right is costly, in at least two ways. First, to institute an effective system of voting requires manpower and resources. Secondly, the right to vote is costly to officials inasmuch as it makes their tenure in office vulnerable to decision-making by the voters and requires them to abandon office whenever the voters render an adverse verdict.

It is wrong therefore to contrast the kinds of demands made in the name of political rights and the kinds of demands made in the name of economic and social rights. Though the latter are not Hohfeldian powers, still rights of both sorts require the institution and operation of administrative systems; both involve manpower and resources; both presuppose a relatively stable and well-

5. Maurice Cranston, 'Human Rights, Real and Supposed,' in D.D. Raphael (ed.) *Political Theory and the Rights of Man* (London: Macmillan, 1967).

6. For 'power', see Wesley Necomb Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919), pp. 50 ff.

organized society; and both require governments and government officials to do certain things under certain conditions, not merely refrain from doing certain things.

But perhaps this is to take too superficial a view. Someone who wanted to insist that the right to vote is a negative right might argue as follows. The right to vote is important only because the exercise of political power is a matter of moral concern. And the exercise of political power is a matter of moral concern because it restricts the (negative) liberty of individuals. We argue for the right to vote, therefore, by saying (1) that individuals have a fundamental negative right against the coercion that exercises of political power involve, (2) that this fundamental right is respected either by limiting the exercise of political power or by securing the consent of those who are subject to it, and (3) that voting is a way of securing something like consent.[7] Although securing consent may be a costly and time-consuming activity (as it is also in other areas of negative right), that fact alone does not make the right which the consent protects any less a negative right.

This account is ingenious; it contains a substantial element of truth; and it would be almost completely persuasive were it not for the fact that we can also offer an alternative account of what lies beneath the right to vote—an account which represents the deeper consideration as a positive rather than a negative right. People owe each other certain fundamental duties of respect and mutual aid which are better fulfilled when orchestrated by some central agency like the state than when they are left to the whims of individuals.[8] But since it is *my* duties (among others') whose performance the state is orchestrating, I have a right to a say in the decision-mechanisms which control their orchestration.

I am not saying that the account I have just given is superior to the account given in the paragraph before. It is a competitor; or

7. This account is broadly Lockean in character, and one would want to invoke the complexities of a theory like Locke's to justify the claim that voting in a majoritarian system counted as individual consent. Briefly, one would have to show that the system of majoritarian voting—or the constitutional basis on which it was set up—commanded the unanimous consent of those legitimately subject to the political power in question. See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, paras. 95–99 and 132 (pp. 330–3 and 354–5).

8. For different versions of this account, see Robert E. Goodin, 'The State as Moral Agent', in Alan Hamlin and Philip Pettit (eds.) *The Good Polity: Normative Analysis of the State* (Oxford: Basil Blackwell, 1989) and R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), pp. 195–216.

maybe the two are complementary. But surely we do not have to choose between them in order to work out—formally—what sort of right the right to vote is. It seems better to give an account of what it involves, what sort of duties it imposes, whether it is a power or a claim-right, etc., and leave it as a *separate* though certainly an important question in political philosophy what opportunities or difficulties, associated with political power and political organization, the right to vote is responsive to so far as its ultimate justification is concerned.

III

Marx believed that political rights involved collective activity not only in the way in which they were established and secured but also in the way in which they were understood and exercised.[9] He was right about this too. That there is a collective element in the way in which the rights of the citizen are understood is evident from the term commonly used to describe them: the right to *participate*. To participate is 'to take a part or share in an action...',[10] something which necessarily supposes that one is not the *only* person with a part or share in the activity in question.

There is an ambiguity here. Sometimes when we talk about the people participating in government, we mean that there is a place for involvement by ordinary people or their representatives alongside whatever other groups, classes or individuals exercise power and authority in the state. Thus the Roman people participated in the governance of the republic through the *Comitia* and through the intercession of the tribunes of the plebs; but the *sharing* which 'participation' connotes is sharing with other non-popular elements in the republic such as the (aristocratic) Senate. Participation here means the co-existence of different modes of government in a mixed regime. But when participation in politics is demanded as a human right, it usually means much more than

9. I will not discuss Marx's critique of political rights in a bourgeois society. Briefly, his position was that the collective character of such rights is distorted by the political system's being regarded as a means to economically individualistic ends. (Marx, op. cit., p. 147.) See also Karl Marx, 'Critical Remarks on the Article "The King of Prussia and Social Reform"' in *Karl Marx: Selected Writings* (ed.) David McLellan (Oxford: Oxford University Press, 1977), p. 126.

10. *The New Shorter Oxford English Dictionary* (Oxford: Clarendon Press, 1993), Vol. II, p. 2109.

this. The demand is not merely that there should be a popular element in government, but that the popular element should be decisive. The demand is for democracy, not just the inclusion of a democratic element in a mixed regime.

What becomes of the *sharing* connoted by 'participation' in this second more radical demand? 'Sharing' refers now to the fact that each individual claims the right to play his part, *along with the equal part played by all other individuals*, in the government of the society. As a right-bearer he demands that his voice be heard and that it count in public decision-making. But the form in which his demand is made—a right to *participation*—acknowledges on its face that his is not the only voice in the society and that his voice should count for no more in the political process than the voice of any other right-bearer. His contribution aspires, of course, to decisiveness, but the aspiration is tempered by principles of fairness and equality implied in the universalization of his claim.[11]

In this regard, the right to participate displays up front—in its *slogan*—something that most of us think about rights of all sorts but usually make evident only at the level of *theory*. When we talk about a right to liberty, for example, or even rights to certain basic liberties, we think that the extent of the right in question is determined by something like a principle of equality. Thus, John Rawls's principle of liberty embodies a commitment to equality: 'Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.'[12] Because the exercise of one person's liberty may conflict with and thus limit the liberty of another, the proper extent of the right is determined by making adjustments in what is allowed to each so that the final scheme is secured for each at the highest level of liberty consistent with equality.

Actually, there is also another constraint in the Rawlsian formula. It is important not only that liberty be equal for all, but also that the scheme of basic liberties secured for each be 'adequate' at an

11. To put it another way: he demands no more than an equal share, but the logic of equality in this as in other contexts requires that it be equality at the highest level of individual effectiveness consistent with a like effectiveness for all. (See Gregory Vlastos, 'Justice and Equality', in Jeremy Waldron (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 62–8.)

12. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 60.

individual level.[13] It must be adequate, that is, for the purposes for which each individual wants and requires liberty—namely, self-development and the living of a life in accordance with his own conception of the good.[14] A concern for adequacy takes seriously the possibility that, in a crowded society, the equality requirement may squeeze the liberty of each person down to such a modicum that, at the individual level, it is scarcely worth having or fighting for. The algebra of modern liberalism rests on the hope that this will turn out not to be the case, and that the two constraints of equality and adequacy can be satisfied together.[15]

A similar issue is sometimes posed for political participation. The modern voter is sometimes afflicted by an anxiety that his individual voice and vote will be lost among the millions of others who participate with him in elections and referendums. If each person's voice is so insignificant, it may be questioned whether the right of participation is actually a right worth having. This concern loomed large in Benjamin Constant's argument for preferring what he called the liberty of the moderns to the liberty of the ancients. In ancient republics, '[t]he share which... everyone held in national sovereignty was by no means an abstract presumption as it is in our own day. The will of each individual had real influence: the exercise of his will was a vivid and repeated pleasure.'[16] The same is not true, Constant said, of the individual in the modern political community. Even in 1819 the size of the community dwarfed the participatory contribution of each citizen:

> His personal influence is an imperceptible part of the social will which impresses on the government its direction.... Lost in the

13. Thus in a more recent formulation, Rawls talks of 'a *fully adequate* scheme of equal basic liberties which is compatible with a similar scheme of liberties for all' (my emphasis). See John Rawls, 'The Basic Liberties and their Priority' (1981), reprinted in S. McMurrin (ed.) *Liberty, Equality and Law: Selected Tanner Lectures on Moral Philosophy* (Salt Lake City: University of Utah Press, 1987), p. 5.

14. Isaiah Berlin, in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), p. 124, states the adequacy condition in this way: '[T]here ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred'.

15. Or, to put it in more distinctively Rawlsian language, the hope is that the rational can be reconciled with the reasonable: see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 48 ff.

16. Benjamin Constant, 'The Liberty of the Ancients Compared with that of the Moderns', in *Benjamin Constant: Political Writings*, ed. B. Fontana (Cambridge: Cambridge University Press, 1988), pp. 314, 316.

> multitude, the individual can almost never perceive the influence he exercises. Never does his will impress itself upon the whole; nothing confirms in his eyes his own cooperation.[17]

So long as each person's share of political authority is this small, it seems difficult to make a case for its adequacy. Accordingly it is hard to argue for it as a matter of right—hard, that is, to show the importance of its not being qualified, complemented or undermined by other non-democratic mechanisms of political decision-making.[18]

Some say the diminution of each vote is more than made up for by the corresponding scale of the issues it addresses. I am only one voice among millions, but the social decision in which I participate is a decision affecting millions. The voter's choice therefore is still something that should be taken seriously when such momentous outcomes are in question.[19] It may be wrong, however, to think that adequacy is best understood as a function of power—that is, power in the crude sense of *scale of consequences diminished by improbability of decisiveness*. Perhaps the adequacy condition for the right to participate has less to do with a certain minimum prospect of decisive impact and more to do with avoiding the insult, dishonour,[20] or denigration that is involved when one person's views are treated as of less account than the views of others on a matter that affects him as well as the others.

Some rights involve what Joel Feinberg has called 'comparative justice', meaning that what justice requires in the distribution of

17. Ibid., p. 316.

18. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), p. 21.

19. See Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), pp. 73–5. Parfit argues that familiar puzzles about why people vote when their vote has such a small chance of determining the result rest on the assumption that people only vote for the sake of the difference outcomes may make to their personal well-being. If we suppose, however, that each person is concerned by the difference outcomes may make to the general welfare, then the decision to vote may look more rational. If (say) the cost to me of voting is $10 but the difference between the outcome I favour and the outcome I oppose is worth (I think) $2,000 to each American, then as an altruist I will certainly vote whenever I think the chance of my vote being decisive is greater than 1 in 52 billion. As Parfit notes, political scientists who bother with these calculations believe that the chance is in fact an order of magnitude greater than this (i.e. more like one in several hundred million).

20. Cf. Aristotle, *The Politics*, Bk. III, Ch. 10, 1281a29–32, translated by Benjamin Jowett, in the new Stephen Everson edition (Cambridge: Cambridge University Press, 1988), pp. 65–6: 'Then ought the good to rule and have supreme power? But in that case everybody else, being excluded from power, will be dishonoured. For the offices of a state are posts of honour; and if one set of men always hold them, the rest must be deprived.'

certain goods is not any particular amount, or any amount adequate to a particular purpose, but an amount determined *primarily* by the need to avoid inequality (or some other form of quantitative unfairness, like disproportionality) in the amounts awarded to different persons.[21] Feinberg argues, persuasively, that the key to comparative justice is avoiding the arbitrariness and insult that unequal or disproportionate treatment involves (no matter what absolute level of treatment we are talking about).[22] I suspect this too is primary in the resentment people feel when they are excluded from participation in public affairs in which other members of their society are involved.[23] If this is correct, it may be impossible and inappropriate to distinguish adequacy and equality as separate constraints in the case of the right to participate in politics.

The position has to be understood carefully. A comparative justice account of participatory rights still needs to be supplemented by an account of what is at stake in the exercise of political power. Comparative injustice with regard to political authority is not the same as comparative injustice in regard, say, to criminal punishment: both may involve elements of insult, but the character of the insult differs as between the two cases. The peculiar insult to an individual, A, of A's being excluded from political power has to do, first, with the impact of political decisions on A's own rights and interests, and, second, with A's possession of the capacity to decide responsibly about those issues, given that A's own rights and interests are not the *only* rights and interests involved. Because A is affected (along with B, C, D,...), A can think of himself as having standing in the matter. (This, I take it, is the force of Colonel Rainsborough's insistence at Putney: '...the poorest he that is in England has a life to live as the greatest he....')[24] And because A has a sense of justice, A may think of himself as

21. See Joel Feinberg, 'Noncomparative Justice', in his collection *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980), pp. 266–7.

22. Ibid., pp. 286–7.

23. Gerald Gaus, *Justificatory Liberalism: An Essay in Epistemology and Political Theory* (New York: Oxford University Press, 1996), pp. 248–57 misleadingly suggests that a concern for equality is necessarily a concern for the vote as a personal good, rather than a concern about one's status as an equal.

24. 'The Putney Debates: the Debate on the Franchise' (1647) in David Wootton (ed.) *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (Harmondsworth: Penguin Books, 1986), p. 286.

having what it takes to participate in decisions of this kind. If A is nevertheless excluded from the decision (for example, because the final decision has been assigned to an aristocratic elite), A will feel slighted: he will feel that his own sense of justice and that of people like him have been denigrated as inadequate to the task of deciding, not only something important, but something important in which he, A, has a stake as well as others. To feel this insult does not require him to think that his vote—if he had it—would give him substantial and palpable power. He knows that if he has the right to participate, so do millions of others. All he asks—so far as his participation is concerned—is that he and all others be treated as equals in matters affecting their interests, rights and duties.

IV

Although the influence of an individual vote is small, the effects of voting by large numbers of individuals are not. Politics is a serious business. In modern societies, political decisions determine, by action or default, things like the distribution of food, housing, medical and educational services; by determining law and legislation, they determine the details of respect for the individual, the pursuit of justice, and the parameters of civil and political freedom; and (in interaction with other states) political decisions govern war and peace, cooperation and hostility, not to mention the control and unleashing of weapons of mass destruction.[25]

Jon Elster has suggested, on the basis of considerations like these, that ultimately any defence of the right to participate—indeed any defence of *any* system of political authority—must be an *instrumental* defence.[26] After all, political decisions are decisions *about* something which we all acknowledge to be important; so surely that sense of the important stakes for which the political game is played should govern our thinking about the appropriate rules for the game. He intends this as a criticism of what are sometimes called 'expressivist' theories of voting—

25. Cf. Brian Barry, 'Comment', in Stanley Benn et al., *Political Participation* (Canberra: Australian National University Press, 1978), p. 47; quoted in Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press, 1983), op. cit., p. 99.

26. See Elster, op. cit. See also MacFarlane, op. cit., p. 141: 'It is important to stress that all political rights are instrumental rights, whose importance lies in the ends which the right concerned may be used to secure'.

theories which hold that voting is best understood and valued as a mode of self-expression, and that the point of giving everyone the vote is to provide them with an opportunity to identify themselves publicly with some view on a matter of common concern.[27] If voting determines outcomes as serious as war and peace, liberty and oppression, poverty and equality, surely it is irresponsible to regard individual votes as a form of flamboyant self-expression. In other words, expressivist accounts of the importance of participation convey the misleading impression that the substance of politics—the decisions to be made and their implications for real people—matter less than the catharsis, the righteous sense of commitment, and the agonistic flair involved in publicly identifying a particular view as one's own.

Defenders of the expressivist view may respond by appealing once again to Constant: they will say that since the actual influence of my individual vote is vanishingly small anyway, I might as well use it as an occasion for expression, rather than worry my head about outcomes, probabilities or consequences. But this is no more plausible in participatory politics than in any other case of collective action involving millions of individuals. Consider, for example, roadside pollution due to traffic: I may not be able to identify the contribution *I* make to the health problems of poor families living near freeways, but I am well aware that their health is imperilled by hundreds of thousands of drivers including me. I know too that it is only the fitting of emissions control devices to automobiles by most of these drivers that can possibly abate that threat. If I drive without such a device, I am doing something wrong despite the indiscernibility of the harm occasioned by the emissions from my car in particular: I am failing to play my part in the collective enterprise of averting great harm in circumstances in which only a collective enterprise would do. Though it is true that the enterprise does not require the participation of absolutely everyone (and so it does not require *my* participation, provided enough others take part), still there is no reason of fairness for me

27. Elster cites the following from Stanley Benn, 'The Problematic Rationality of Political Participation', in Benn et al., *Political Participation*, op. cit., p. 19, as an example of an expressivist theory: '[P]olitical activity may be a form of moral self-expression, necessary not for achieving any objective beyond itself (for the cause may be lost), nor yet for the satisfaction of knowing that one had let everyone else know that one was on the side of the right, but because one could not seriously claim, even to oneself, to be on that side without expressing the attitude by the actions most appropriate to it in the paradigm case.'

in particular to relieve myself of the burden of participation, given that the participation of most drivers is required.[28] So—to return to the analogy with expressivism—even though the emissions of an individual automobile may have only a tiny impact on the environment, it surely does not follow that individual drivers are entitled to regard the decision whether or not to fit anti-emission devices as an occasion for flamboyant self-expression. The stakes are too high, and even though there are millions of us involved, nothing but millions of drivers making the right decision will avert the very great harm of pollution.

Something similar is true of the moral importance of voting. When a government is elected or a plebiscite takes place, millions of voters act together to secure something (which they regard as) important, something that in our political system cannot be secured save by our acting together in very large numbers. The particular form this collective enterprise takes is for us to match our numbers against the large number of those we expect to engage—wrongfully, we think—in a similar collective enterprise on the other side. If I fail to vote (for the candidate or measure that deserves to win), I have done a wrong comparable to that involved in the emissions example: I have failed to play my part in the collective action that is required in order to secure an important good or avoid a grave harm. And I have done so in circumstances where there is no reason in fairness for me in particular to relieve myself of the burden of participation, given that the participation of most (right-minded) citizens is required. In these circumstances, it is irresponsible for me to regard my vote simply as an occasion for self-expression; instead I should reflect responsibly on the difference it is actually likely to make—along with millions of other votes—to life-and-death issues that affect everyone.

So: each individual should participate in a way that pays attention to the consequences of his participation. But does it follow, as Elster suggests, that therefore the justification of the system of participation must be an instrumental one? I think not. The argument of the last few paragraphs concerns the attitude a voter should take to his exercise of the franchise. He should

28. I owe this last point to James Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (Oxford: Clarendon Press), p. 206–19.

exercise it responsibly, on the basis of what his vote (along with large numbers of others) may cause to happen in the world. But from the fact that considerations of a certain kind ought to guide a right-bearer in the exercise of a given right, we are not entitled to infer that his actually having the right is justified by considerations of that sort.

We can infer *something* from the gravity of the considerations mentioned on the previous page. If the decision as to *how* to vote should be taken seriously because of the high stakes involved, it certainly follows that the question as to whether there *is* a right to vote is to be taken seriously also. Because of what is at stake in politics, the principle of participation requires a strong and robust defence—one that can be presented, for example, as a credible response to perennial worries about the risks that losers run in submitting to majority decisions. In the context of this sort of concern, the argument that they must accept such risks so that people can enjoy the indulgence of *expressing* themselves at the ballot box does seem seriously out of its league.

We can put the same point in a slightly different way. Voting is a way of deciding among important social options. Those who urge one option or the other will put forward serious justificatory arguments designed to show, first, that the stakes in the decision are very high, and secondly, why it is important that those stakes should play out in a particular way. No defence of voting or of the right to vote can succeed if it denigrates these arguments or if it relies on their being treated as unimportant. Since an affirmation of the right to participate addresses the issue of *who is to make social decisions when the stakes are this high*, it requires a justification that is, so to speak, in the same league of moral seriousness as the justifications associated with the substantive options that compete in the political forum. Elster is right, then, to condemn the frivolity of the expressivist accounts; but it is a mistake to think that only instrumental considerations can have the requisite degree of seriousness. Particularly since it is a *right* we are considering—the right to participate (in decisions affecting one, on equal terms with others)—we should ask whether there is not a defence available, with the requisite level of seriousness, that is not itself an instrumentalist account.

After all, theorists of rights are generally very uneasy about instrumental justifications. Inasmuch as they present rights as a means to a social end, instrumental justifications leave the rights hostage to contingent calculations of utilitarian advantage.[29] A right with an instrumental justification is always liable to managerial mani-pulation, limiting the right or modifying its exercise in order to fine-tune the generation of socially desirable consequences.[30] And this seems to be at odds with the 'trumping' function of rights, which is precisely to set limits on the pursuit of social utility.[31]

I do not mean this as a knock-down argument against instrumental justifications. It is not enough simply to *repeat* 'Rights as trumps', as though that were some sort of mantra. Surely we do not have a trumping right to harm, or to participate in harming, other people. And if, as seems to be the case, the exercise of voting rights is capable of causing grave harm as well as doing great good, the instrumentalist is entitled to ask what exactly is wrong with governing their scope or distribution in a way that minimizes the harm and maximizes the good? And he is entitled to press for an answer, not an incantation.

The real answer that we should give him has to do with the difficulty of specifying the goals or *teloi* of such instrumental management.[32] The specification of social goals—to which participatory rights are supposed (on his account) to be instrumental—is not only intensely controversial in modern society; it is of course the primary subject-matter of the very politics that participatory rights are supposed to constitute. Those

29. See David Lyons, 'Utility and Rights', in Waldron (ed.) *Theories of Rights*, op. cit.

30. If we accept an instrumental theory of participation, we must accept (as MacFarlane points out, op. cit., p. 141) that 'arguments about the nature and requirements of political rights will, when used in debates about the desirability of restricting or extending political rights, be colored by the expectations of political consequences which will follow from the changes projected.'.

31. For rights as trumps, see Ronald Dworkin, *Taking Rights Seriously* Rev. Edn. (London: Duckworth, 1977), esp. p. xi. See also Ronald Dworkin, 'Rights as Trumps', in Waldron (ed.) *Theories of Rights*, op. cit.

32. In an discussion of similar managerial approaches to free speech, Robert Post remarks that '[m]anagerial structures necessarily presuppose objectives that are unproblematic and hence that can be used instrumentally to regulate domains of social life. The enterprise of public discourse, by contrast,... requires that all possible objectives, all possible versions of national identity, be rendered problematic and open to inquiry.' (Robert Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge: Harvard University Press, 1995), p. 275.)

who claim participatory rights are demanding the right to participate *in resolving controversies of this sort*. They want to be among those who determine the social goals and conceptions of the common good relative to which political management and political instrumentality will be defined. That is why the point made earlier—about not simply *inferring* the need for an instrumental justification of the right from the instrumental responsibility associated with its exercise—is so important. In deciding how to vote, the individual citizen must figure out what is important in politics, and how his vote along with millions of others can best promote it. This instrumental responsibility requires judgment among ends as well as means; and it involves choice among intensely controversial alternatives. The whole point of voting is that, in the teeth of these controversies, social ends are to be determined collectively by millions of individual judgments. But that can hardly be so if the process of enfranchising, counting and implementing these judgments is governed and modified by some prior and entrenched selection among the alternatives.

V

Politics is about principle as well as policy. What happens in the political process determines not only what our social goals are, but also the content and distribution of individuals' rights. Of course the political process cannot control anyone's critical sense of what rights we have or ought to have, nor can it affect the truth about that issue (if talk of truth is appropriate here). But since people disagree about what rights we have or ought to have, the specification of our legal rights has to be accomplished through some political process.

Rights, in other words, are no exception to the general need for authority in politics. Since people hold different views about rights and since we have to settle upon and enforce a common view about this, we must ask: 'Who is to have the power to make social decisions, or by what processes are social decisions to be made, on the practical issues that competing theories of rights purport to address?' As political philosophers, our task is to inquire into the principles and criteria by which this question of authority is to be answered. The claim we have been examining—the claim that political participation is a right—constitutes an answer, or at least

part of an answer, to the question of authority. When someone asks, 'Who shall decide what rights we have?', one answer is: 'The people whose rights are in question have the right to participate on equal terms in that decision.' But it's not the only possible answer. Instead of empowering the people on the grounds that it is, after all, their rights that are at stake, we might instead entrust final authority to a scholarly or judicial elite, on the ground that they were more likely to get the matter right.

As we begin our discussion of these proposals, it may be worth making a few general observations about the problem of authority in politics.

(1) First, a point about disagreement. That we disagree about some substantive issue and consequently need to invoke an authority to act in the face of our disagreements is not necessarily a concession to moral subjectivism or conventionalism or relativism. One can recognize the existence of disagreement in society, including disagreement on matters of rights and justice—one can even acknowledge that such disagreements are, for practical political purposes, irresolvable—without staking the meta-ethical claim that there is no fact of the matter about the issue that the participants are disputing.[33] The need for authority in the area of rights is not a consequence of the rejection of objectivity in that area; it is a response to the fact that, even if there is a right answer to the question of what rights we have, still people disagree implacably about what that right answer is.

(2) Thus, secondly, we are not to *despair* of substantive thought or deliberation about rights. What one needs to do is *complement* one's theory of rights with a theory of authority, not *replace* the former with the latter. The issue of what counts as the right decision about rights does not disappear the moment we answer the question 'Who decides?'. On the contrary, substantive theorizing about rights is what we expect the designated authority (e.g. the participants in a democracy) to do. Each competing theory of rights

33. For the contrary view, see Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984), p. 129: 'Where there is certain knowledge, true science, or absolute right, there is no conflict that cannot be resolved by reference to the unity of truth, and thus there is no necessity for politics.' See also David Estlund, 'Making Truth Safe for Democracy', in D. Copp, J. Hampton, and J. Roemer (eds.) *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993).

can be understood as a well-thought-out piece of advice offered to whomever has been identified (by the theory of authority) as the person to take the decision or as one of the persons who is to provide an input into the public choice mechanisms that will yield a collective decision. The mechanism needs inputs or the authority needs advice (or a theory of its own), and so *someone* should be thinking through the substantive issues, undeterred in this by the existence of disagreement and opposing alternatives.

(3) But, thirdly, a substantive theory of rights is not itself the theory of authority that is needed in the face of disagreement about rights. An adequate answer to the question of authority must really settle the issue. It is no good saying that, when people disagree about rights, the view which should prevail is *the truth about rights* or *the best account of the rights we have*. Each theorist regards his own view as better than any of the others (otherwise he would abandon his theory and adopt one of the others). So this way of settling on a social choice in the face of disagreement would reproduce exactly the disagreement that called for an authority-rule in the first place. The theory of authority must identify some view as the one to prevail on criteria other than those which are the source of the original disagreement. This is one of Thomas Hobbes's contributions to political philosophy: any theory that makes authority depend on the goodness of political outcomes is self-defeating, for it is precisely because people *disagree* about the goodness of outcomes that they need to set up and recognize an authority.[34]

I find that people are very unhappy about this third point. Because the liberties and interests that rights protect are so important, they are very uncomfortable with any political procedure that leaves open the possibility that we will be saddled with the (objectively) wrong answers about rights. This discomfort sometimes leads them to qualify their views about authority with a rider that is supposed to protect individual rights against that possibility. For example, they may say, 'If the members of a society disagree about some issue, then a social decision should be reached by majority voting, *provided individual rights are not violated*

34. See Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1988), Ch. 18 and Thomas Hobbes, *De Cive: The English Version*, ed. H. Warrender (Oxford: Clarendon Press, 1983), VI. 6.

thereby.' But the emphasized rider will not work as part of a theory of authority for a society in which rights themselves are a subject of political disagreement. People who disagree *inter alia* about rights will disagree about what that theory of authority requires, and that latter disagreement will be nothing but a reproduction of the problem about rights which indicated the need for a theory of authority in the first place.

Similarly, we cannot say, for example with Ronald Dworkin, that the whole *point* of rights is to 'trump' or override majority decisions.[35] Rights may be the very thing that the members of the society are disagreeing about, the very issue they are using a system of voting to settle. If we say, in a situation in which people disagree about rights, that rights may 'trump' a majority decision, it is incumbent on us to announce which of the competing conceptions of rights is to do the trumping, and how that is to be determined. But to make such an announcement in the name of the whole society is of course to beg the very question at issue.[36]

(4) It follows from what has been said that, unless one is very lucky, there will often be a dissonance between what one takes to be the right choice and what one takes to be the authoritative choice in political decision-making. A person who holds a complete political theory—one that includes a theory of authority as well as theories of justice, rights, and policy—may find himself committed to the view that the wrong decision ought to prevail. His theory of justice may condemn policy B and prefer policy A on right-based grounds, but his theory of authority may support a decision procedure (designed to yield a social choice in the face of disagreement about e.g. the justice of A or B) which, when followed, requires that B be implemented.

35. Dworkin, *Taking Rights Seriously*, op. cit., pp. 199–200. Notice that this use of the 'rights-as-trumps' idea is slightly different from that discussed above at note 35 and accompanying text. Rights as trumps over social utility is a different idea from rights as trumps over majority-decision: see Jeremy Waldron, 'Rights as Majorities: Rousseau Revisited', in John Chapman and Alan Wertheimer (eds.) *Nomos XXXII: Majorities and Minorities*, Yearbook of the American Society for Political and Legal Philosophy (New York: New York University Press, 1990), reprinted in Waldron *Liberal Rights*, op. cit.

36. See also Hobbes, *Leviathan*, op. cit., Ch. V, p. 33: 'And when men that think themselves wiser than all others, clamour and demand right Reason for judge; yet seek no more, but that things should be determined, by no other men's reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand.'

This prospect is simply unavoidable. Richard Wollheim called it 'a paradox in the theory of democracy.'[37] He imagined citizens feeding their individual evaluations of policies into a democratic machine which would always choose the policy with the greatest number of supporters. The paradox arises from the fact that each citizen, if he is a democrat, will have an allegiance to the machine and its output, as well as to the evaluation which counts as his own whole-hearted input. It is the paradox that allows 'one and the same citizen to assert that A ought to be enacted, where A is the policy of his choice, and B ought to be enacted, where B is the policy chosen by the democratic machine.'[38] But Wollheim was wrong to describe it as a paradox of *democracy.* It is a general paradox in the theory of authority—a paradox affecting *any* political theory which complements its account of what ought to be done with an account of how decisions ought to be made when there is disagreement about what ought to be done.

It is general in another way as well—general as opposed to exceptional. In modern societies, disagreement (including disagreement about principles) is one of the basic circumstances of political life, in roughly the way that moderate scarcity is one of the circumstances of justice.[39] When we think about distributive justice, we must be ready for situations in which *not everybody gets what he wants*: the circumstance of moderate scarcity tells us that this is not exceptional, but normal, in the conditions of human life. We must not construct a conception of justice that laments this as an unfortunate aberration or as a distasteful aspect of second-best theory: we must rather construct a theory that places this prospect firmly in the core of our thinking about justice. The same is true of disagreement and disappointment in politics. In the circumstances of politics, a person should not be surprised to find himself from time to time under an obligation to participate in social arrangements he regards as undesirable on grounds of justice (an obligation to pay taxes, for example, to provide welfare assistance to people he regards as undeserving). That is more or less bound to happen, given that it is the function of law and politics to proceed

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

38. Ibid., p. 84.

39. For 'the circumstances of justice', see Rawls, *Theory of Justice*, op. cit., pp. 126–30.

with the building of social frameworks and the orchestration of collective action in circumstances where people disagree about justice. Wollheim's paradox therefore should not be regarded as an anomaly. It is a normal predicament for most people at least some of the time and for many people most of the time, in the circumstances of politics.

These points about Wollheim's Paradox are quite important for modern debates about rights, courts, and constitutionalism. Rights-based judicial review of legislation is often defended by pointing to the possibility that democratic majoritarian procedures may yield unjust or tyrannical outcomes. And so they may. But so may *any* procedure that purports to solve the problem of social choice in the face of disagreements about what counts as injustice or what counts as tyranny. The American practice of allowing the Supreme Court to make the final decision (by majority voting among its members) on issues of fundamental rights has on occasion yielded egregiously unjust decisions (certainly decisions opposed, on grounds of justice, by me and many of my friends).[40] Anyone whose theory of authority gives the Supreme Court power to make decisions must—as much as any democrat—face up to the paradox that the option he thinks just may sometimes not be the option which, according to his theory of authority, should be followed.

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

(5) A fifth point follows in connection with Wollheim's 'Paradox.'[41] (This is the first of the two points which, I said at the

40. For an uncontroversial example of an egregiously unjust decision, see the '*Dred Scott*' decision, *Scott* v *Sandford* 60 US (19 How) 393 (1857). See also *Lochner* v. *New York* 198 U.S. 45 (1905), and the more than one hundred and fifty cases in which fine pieces of labour and factory legislation were struck down by state and federal courts in the period 1880–1930. (There is a list in William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991), pp. 177–92.)

41. The next few paragraphs are adapted from Jeremy Waldron, 'The Circumstances of Integrity', *Legal Theory*, 3 (1997), pp. 9–10.

very beginning, it was my overall aim in this paper to establish.) We sometimes say that a principle of authority (such as participatory majoritarianism) *conflicts* with other rights, for example in situations in which popular majorities vote to impose restrictions on some right. (I shall call the putative right which is the subject of the vote, 'the target right'.) The example I mentioned at the beginning of the paper was a popular vote in favour of a law restricting the free exercise of religion; there, religious freedom is the target right. In cases like this, it is commonly said that the two rights (political participation and religious freedom) conflict and one of them must give way: either the target right prevails, in which case the members of the majority do not have the participatory right to make whatever laws they like; or participation prevails, in which case the target right must give way to the popular will. I believe, however, that this is a misleading characterization and that 'conflict' is the wrong word to describe what is happening in cases like this.

We should not talk about a conflict between principles A and B (in some situation X) unless the following conditions are satisfied: (i) the two principles are held by a single agent, and (ii) it is clear what A requires of that agent in X and clear what B requires of that agent in X, and (iii) those requirements are incompatible. That is seldom the situation as between participatory rights and target rights. We may know and agree what respect for participation requires in the given situation, but of course we do not agree about the target right. (We disagree about whether it exists; and/or we disagree about what it entails, if it does exist). That is why we need a principle of authority. In general, principles of authority (such as participatory majoritarianism) present themselves as principles to govern social decision-making in circumstances where some members of the society think that rights require one thing and other members of the society think that rights require something else. When majority voting indicates that one of these factions is to prevail at the level of social decision, the result will seem to the members of that faction to be congruent with what is required by rights, even as it seems to members of the other faction to be at odds with what is required by rights. This disparity—as to whether there is actually a conflict with rights or not—should alert us to the possibility that there is something of a 'category-mistake' in treating the right to participate and the target right as coordinate

principles, competing on the same level. If we talk about a conflict between target rights and participatory majoritarianism, we seem to imply that sometimes the target rights might weigh more heavily, and sometimes participation might weigh more heavily. But the problem is not about weighing and balancing; the problem is that we disagree in these cases about what exactly rights require, and thus we disagree about what goes into one side of the balance.

The point of these last few paragraphs is not to show that we ought to invoke participatory majoritarianism in order to settle disagreements about rights. (That will be the burden of sections VI and VII.) There are other principles of authority available, such as monarchy (one supreme ruler decides), judicial aristocracy (the final power of decision is assigned to the members of a Supreme Court), or various forms of mixed regime. All I am showing is that *if* we choose participatory majoritarianism (indeed, if we choose *any* of these principles of authority), it makes no sense to talk of a conflict between the principle of authority that we choose and the rights about which the authority has to decide. Since we disagree about whether these rights exist or not and/or about what they entail if they do—if we did not disagree we wouldn't need a principle of authority—there is no neutral way of stating what exactly it is that is supposed to be competing with participatory majoritarianism or whatever the principle of authority is.

(6) One last point. Like all rights, the one that we are considering—participation—is an appropriate subject-matter for authority: in politics, the right to participate (its nature and limits) is one of the topics on which we disagree and about which we have to decide. But, unlike other rights, the right to participate also presents itself as a possible answer (or part of an answer) to the question of authority. That participation can be both the subject-matter of authority as well as part of a theory of authority might seem to pose some circularity: it seems circular to use a principle of authority to settle disagreements *about* authority, or to use majoritarian methods to settle disagreements *about* majoritarianism.

In fact, there is no paradox or vicious circle in this. From time to time, we must decide how political decisions are to be made, and we need a procedure, of course, to choose among the possible procedures that present themselves. For example, the question as to whether legislative voting or judicial decision is to be final (with

regard to some range of issues) may be assigned to a court for decision. To a careless eye, this may look as though we are privileging one of the possible outcomes—viz. judicial decision—by using *it* as the procedure for deciding among the possible outcomes. And—I have heard people say—if it makes sense to privilege one of the outcomes in this case, why does it not also make sense to privilege one of the outcomes in an ordinary case where substantive rather than procedural questions are at stake? But to decide among judicial decision and legislative voting by using as a method judicial decision is not to *privilege* judicial decision; it is simply to use it. (At most, our use of it indicates that we want to ask, 'Should we continue to use judicial decision to decide on matters where important principles are at stake, or should this—i.e. this present decision—be the last time we use it?') If we choose one of the procedures which are up for decision as the procedure for making that very decision, we do so simply because *we need a procedure* on this occasion and this may be the one we are stuck with for the time being. It is not a sleight-of-hand, it is not a matter of giving procedural rights special eminence, and it is not a matter of our concocting for ourselves (and denying to others) an *exception* to the general rule that reference to desirable outcomes cannot infuse the procedures used to decide among outcomes when their desirability is the subject of disagreement.

VI

Participation, I said, is about principle as much as policy. Those who fought for the vote (whether for working people, the propertyless, women, former slaves, or others disenfranchised on grounds of race) had in mind the right to participate not only on policy issues but also on the great issues of principle facing their society. I suspect also that most them fought for participation in the second or radical sense I mentioned in section III of this paper—participation of each individual along with all others in the society as equals, not simply the participation of a democratic element, along with non-democratic elements, in a mixed regime. These two points go together. Those who demanded the right to vote were not seeking radically democratic participation only on issues of policy, as though they would be satisfied by participation in the second sense—the mixed-regime sense—on issues of principle. They

believed that the issues of principle affecting them—the people—should be settled, ultimately, by them and them only on a basis that paid tribute to their fundamental equality.[42]

Understood in this way, the demand for equal suffrage amounted to the claim that issues of right should be determined by the whole community of right-bearers—i.e. by the whole community of those whose rights were at stake. As a principle of authority, it was the claim that disagreements about rights should be settled by those who were the subjects of that disagreement. Those who make this claim are aware that it is controversial. But they think it wrong and offensive *to them as right-bearers* to reject the claim out of hand.

Let me explain that last point in detail, because it goes to the heart of the issues about participation and rights that I am trying to set out.

I have argued elsewhere[43] that the idea of rights is based on a view of the human individual as essentially a thinking agent, endowed with an ability to deliberate morally, to see things from others' points view, and to transcend a preoccupation with his or her own particular or sectional interests. The attribution of any right, I said, is typically an act of faith in the agency and capacity for moral thinking of each of the individual concerned.[44] This is partly reflected in the fact that rights typically provide an individual with a protected choice on an issue which remains morally significant: the right-bearer must choose between options which are right or wrong, considerate or inconsiderate, noble or depraved.[45] The faith in the right-bearer's choice evinced by the attribution of the right is certainly not confidence that he will unerringly make the right choice; nevertheless it is borne of a conviction that he has the

42. Now, as I have stated it here, this sounds like an exaggeration of their claim, as though it were a demand for direct democracy, whereas most often what was wanted was a vote in the election of representatives. But the underlying point remains. To the extent that a system of representation was thought necessary (on practical grounds), the challenge was to show that such structures were (in the circumstances) the best way of respecting the principle of individuals' political equality. To show that a given structure of representation respected the *combination* of ideals in a mixed regime (equality, perhaps, but also respect for the experience and upbringing of a clerisy or aristocracy) would be a different and probably easier challenge.

43. See Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights', *Oxford Journal of Legal Studies*, 13 (1993), 18–51.

44. Again, this is the equivalent for a theory of rights of Rawls's emphasis of the importance of attributing to people 'a sense of justice' in a theory of justice. See Rawls, *Theory of Justice*, op. cit., Ch. VIII, esp. pp. 505–10. See also footnote 30, above.

45. See Jeremy Waldron, 'A Right to do Wrong', *Ethics*, 92 (1981), 21-39. (Reprinted in Waldron, *Liberal Rights*, op. cit.)

wherewithal to ponder responsibly whatever moral issues the choice involves.

Beyond that, the way in which the idea of rights emerged in early modern thought should remind us that right-bearers were conceived in the first instance as appropriate rights-*thinkers* (not merely as potential victims or interest-bearers whose interests needed protection). The emergent idea of natural rights connoted not just that ordinary individuals were the proper focus of moral and political concern, but also that ordinary individuals were naturally competent judges of issues of right. Rights were attributed to individuals in the state of nature, a circumstance in which each person had nothing but his own resources—his own intellect, his own reason—to indicate to him the rights that he and others had. Theorists such as John Locke were happy to embrace this idea—again, not on account of any great confidence that individual reasoners in the state of nature could be relied on to come up with conclusions that were exactly and unerringly correct or uncontroversial,[46] but on account of their confidence that the *type* of reasoning in which ordinary individuals could be expected to engage was not inappropriate to the questions that they necessarily had to pose for themselves. Certainly Locke rejected out of hand the view—very common today—that on issues of rights the reasoning of judicial officials (Supreme Court justices and their clerks) is to be preferred to reason and judgment of ordinary men and women.[47] The reasoning of legal scholars on matters of rights he regarded as 'artificial Ignorance, and learned Gibberish'—contemptible and mischievous in comparison to the straightforward and 'unscholastick' reasoning of 'the illiterate and contemned Mechanick' pondering his own rights.[48] The point is that the idea of natural rights—i.e. rights in the state of nature—was predicated precisely on the *absence* of lawyerly reasoning. It involved instead

46. See my essay 'Locke's Legislature' in *The Dignity of Legislation* (forthcoming, Cambridge University Press).

47. Cf. Locke, op. cit., II, para. 12, p. 275: '[F]or though it would be besides my present purpose, to enter here into the particulars of the law of Nature, or its measures of punishment; yet it is certain that there is such a Law, and that too, as intelligible and plain to a rational Creature, and a Studier of the Law, as the positive Laws of Common-wealths, nay possibly plainer; As much as Reason is easier to be understood, than the Phansies and intricate Contrivances of Men, following contrary and hidden interests put into Words.'

48. See John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Clarendon Press, 1975), Bk. III, Ch. X, p. 495.

a tight conjunction of concern for each individual as a creature of God[49] and respect for the reason with which God had endowed him:

> The Freedom then of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.[50]

It is impossible, on this account, to think of a person as a right-bearer and not think of him as someone who has the sort of capacity that is required to figure out what rights he has.

This means that arguing about a person's rights is not like arguing about the rights of animals or about the preservation of a building. When we argue about someone's rights, the subject of the conversation is likely to have a considered view on the matter. And since the point of any argument about rights has to do with the respect that is owed to this person as an active, thinking being, we are hardly in a position to say that our conversation takes *his* rights seriously, if at the same time we ignore or slight anything *he* has to say about the matter. Yet again, I emphasize that this does not mean a person has whatever rights he thinks he has or that he cannot be wrong in what he thinks. But it does shows that there is *something* appropriate about the position we are considering—that the right-bearers should be the ones to decide what rights they have, if there is disagreement about that issue—and something unpleasantly inappropriate and disrespectful about the view that questions about rights are too hard or too important to be left to the right-bearers themselves to determine, on a basis of equality.

The democratic position on these matters is often attacked as a violation of the principle, 'No one shall be judge in his own case' (*nemo iudex in causa sua*).[51] Those who invoke this principle say that at the very least it requires that the final decision about rights should not be left in the hands of the people; it should passed on, finally, to an institution such as the U.S. Supreme Court. If the people were to have the final say (e.g. by majority-voting among themselves or their representatives) then either they or the majority would be judges in their own case. Thus it is said, in effect, that the

49. Locke, *Two Treatises*, op. cit., II, para 6, p. 271.

50. Ibid., II, para 63, p. 309.

51. George Kateb has tried to impress upon me the importance of this principle in the present context. (For Locke's consideration of it, see Locke, *Two Treatises*, op. cit., II, para. 13, pp. 275–6.)

nemo iudex principle requires a mixed regime so far as issues of right are concerned.

It is hard to see the force of this argument. Almost any conceivable decision-rule will involve someone deciding in his own case, in one or maybe two ways. First, unless it is seriously imagined that issues of right should be decided by an outsider—a Rousseauian 'law-giver' perhaps,[52] or by some neo-colonial institution that stands in relation to a given community as (say) the British Privy Council stands in relation to New Zealand—such decisions will inevitably be made by persons whose own rights are affected by the decision. Even a Supreme Court justice gets to have the rights that he determines American citizens to have in his deliberations.[53] We too often forget this: indeed often our scholarly talk about when 'the people' or 'the majority' may be entrusted (by us?) with decisions about rights has something of the haughty air of a John Stuart Mill talking *de haut en bas* about native self-government in India.

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

Invoking *nemo iudex* may be appropriate when one individual, class, or faction purports to adjudicate an issue concerning its own interests, as opposed to those of another individual, class or faction

52. Jean-Jacques Rousseau, *The Social Contract*, ed. C. Betts (Oxford: Oxford University Press, 1994), Bk. II, Ch. 7, pp. 76–9.

53. I am not saying that his interest in this affects how he decides; but opponents of majoritarian decision should not say it affects how ordinary voters decide either.

or as opposed to the rest of the community. (So, historically, those who have invoked it against democratic government have often tried to portray democratic government as class rule, i.e. rule by the lower classes.)[54] The objection in such cases to A being judge in his (or its) own case is that B (the other party in the dispute) is excluded from the process. But it seems quite inappropriate to invoke this principle in a case where the community as a whole is attempting to resolve some issue concerning the rights of all members of the community and attempting to resolve it on a basis of equal participation. In such cases it seems not just unobjectionable but *right* that all those who are affected by an issue of rights should participate in the decision: and if we want a Latin tag to answer *nemo iudex*, we can say, '*Quod omnes tangit ab omnibus decidentur*.'

VII

From all of this, we may conclude that the attractiveness of democratic participation consists largely in the fact that it is a *rights-based*[55] solution to the problem of disagreement about rights. It calls upon the very capacities that rights *as such* connote, and it evinces a form of respect in the resolution of political disagreement which is continuous with the respect that rights as such evoke.

It is not the only rights-based approach. It is possible to approach the problem of disagreement and authority in regard to rights on the basis of a sort of rights-instrumentalism: one chooses whatever decision-procedures are most likely to answer the question 'What rights do we have?' correctly. If the people or their representatives can be relied on to come up with the right answer through majority-voting in a legislature, then we set up a right to participation. But if we think judges, bishops, or scholars might do a better job, then we should forgo or qualify popular participation and entrust the final decision to the courts, to a synod, or to a clerisy. I don't want to deny that this is an honourable approach. It takes very seriously the prospect that a given procedure may yield the wrong answer. It says: wrong answers may be tolerable in matters of policy; but on

54. E.g. Aristotle, op. cit., Bk. IV.

55. For the idea of rights-based, duty-based, and goal-based theories, see Dworkin, *Taking Rights Seriously*, op. cit., pp. 171 ff. See also Waldron, 'A Right-Based Critique', op. cit.

matters of principle, if the wrong answer is given, then *rights will be violated*, and it is important to avoid this outcome if at all possible or at least to minimize it (to the extent we can). The rights-instrumentalist thinks that the participatory approach, which I defended in the previous section, simply gestures towards right-bearers' capacities and hopes for the best. This, the instrumentalist says, is irresponsible: instead we should be doing everything in our power to reduce the rights-violations that will result from our political processes, and that means adopting the minimization of wrong answers as our explicit criterion of authority in this area.

Rights-instrumentalism is of course heir to the difficulty we discussed at the end of section IV. Though I do not believe there is anything *intrinsically* repugnant about an instrumentalism or consequentialism of rights,[56] rights-instrumentalism seems to face the difficulty that it presupposes our possession of the truth about rights in designing an authoritative procedure whose point it is to settle that very issue. Consider, for example, the question whether people have rights to socio-economic assistance and, if so, whether these rights impose limits on property rights. A person who thinks that the answer to either question is 'No' will probably respond differently to the instruction 'Design a set of political procedures most likely to yield the truth about rights' than a person who believes that there *are* socio-economic rights and that they *do* place limits on property. Indeed, disparate views on this and similar issues explain most of the differences in constitutional-design proposals among rights instrumentalists.[57] There seems, then, something question-begging about using rights-instrumentalism as a basis for the design of political procedures among people who disagree on issues such as this.

Maybe a more modest rights-instrumentalism is available. Instead of saying (in a question-begging way) that we should choose those political procedures that are most likely to yield the rights specified in a particular controversial conception, we might say instead that we should choose or design political procedures

56. For criticism of the idea of rights-violations as something to be minimized, see Nozick, op. cit., pp. 28 ff. For the contrary view, see Amartya Sen, 'Rights and Agency,' in Samuel Scheffler (ed.) *Consequentialism and its Critics* (Oxford: Oxford University Press, 1988).

57. For a discussion of the way this affected American constitutional design, see Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: the Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990).

that are most likely to get at the truth about rights, *whatever* that truth turns out to be.

But this is not straightforward either. Consider, for a moment, some familiar moves in this more modest rights-instrumentalism. If we think that deliberation about rights is distorted by self-interest, we will try to design institutions that insulate rights-authorities from any immediate concern with the impact of their decisions on their own interests. But if we do this we should do it in full awareness that we are flying in the face of other epistemic precepts: that decisions about rights are best taken by those who have a sufficient stake in the matter to decide responsibly (an argument often used to justify a property franchise), or that the very idea of natural rights celebrates the ability of ordinary people to reason responsibly about the relation between their own interests and those of others (the argument we considered in section VI). We find similar antinomies with other epistemic approaches. If we think the truth about rights requires training and wisdom to discern, we might endow scholars, even moral philosophers, with political authority. If we think, on the other hand, that academic casuistry[58] distorts clear thinking on these matters, we might incline instead to entrust the decision to ordinary voters. Indeed if we accept anything like Jean-Jacques Rousseau's conception of epistemic virtue on the matters that are supposed to be governed by the general will of the people, we might even set up democratic procedures that minimize public deliberation and the opportunity for rhetoric and factionalism.[59]

A quick review of such antinomies should be enough to assure us that it is almost as difficult to defend an impartial account of what the modest version of rights-instrumentalism requires as it is to find a non-question-begging version of direct instrumentalism. In the midst of moral disagreement we are not in possession of any uncontroversial moral epistemology. On the contrary, most theories of moral knowledge (and thus also most theories of moral expertise and epistemic pathology in moral reasoning) are associated directly with a particular set of substantive moral claims: naturalism with utilitarianism, intuitionism with deontology, feminist epistemology

58. What John Locke referred to as 'artificial Ignorance, and learned Gibberish' (*Essay*, op. cit., Bk. III, Ch. X, para. 9.)

59. See Rousseau, op. cit., Bk. II, Ch. 3 and Bk. IV, Chs. 1–3.

with particular equality-claims, and so on. Even among professional epistemologists, there is not the sort of consensus about *paths* to moral truth that would be required for a non-question-begging instrumental defence of political procedures for use among those who disagree, fundamentally, about which moral claims are true and which are not.[60]

It seems then that, as a basis for addressing the issue of authority, rights-instrumentalism faces difficulties which have to do, not just with contingent practicalities, but with a failure ultimately to take seriously the problem of disagreement which poses the issue of authority in the first place. People disagree about rights; they also disagree about the best way to reason about rights; so they simply cannot in their collective capacity follow the instruction 'Confer the authority to resolve these disagreements on those persons and procedures most likely to yield the right answer' in a non-question-begging way.[61]

It follows, I think, that the theory which rejects rights-instrumentalism, and which maintains instead that right-bearers have the right to resolve disagreements about what rights they have among themselves and on roughly equal terms, is the only plausible rights-based theory of authority left in the field. Not only does it not face the question-begging difficulties of rights-instrumentalism, it also has the advantage over the latter that it does not consecrate forms of authority which are radically at odds with those entrusted to ordinary right-bearers in the ordinary exercise and contemplation of their rights. In this sense, one can plausibly say that participation is the rights-theorist's most natural answer to the problem of authority and the disagreements about rights that give rise to that problem—or, in short, that the right to participate is indeed, as William Cobbett suggested, 'the right of rights'.

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60. See also the excellent discussion in Gaus, op. cit., p. 185.

61. See also Jeremy Waldron, 'The Irrelevance of Moral Objectivity', in Robert George (ed.) *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), 158–87.