

INTRODUCTION: DISAGREEMENTS ON JUSTICE AND RIGHTS

*Jeremy Waldron**

I'm grateful to my distinguished fellow panelists for agreeing to spend what would otherwise be a perfectly pleasant Friday afternoon in the sunshine here in the shade, examining a very shady theory of how fundamental decisions about individual rights should be made.

The premise of my book *Law and Disagreement*¹ goes something like this: it says that we live in a community whose members disagree about the existence of God or how to worship him. They disagree about what gives meaning to life. They disagree about what makes a life a good life. They disagree about recipes. They disagree about aspirations. They disagree about spirituality. They disagree about tons of things like that, and our constitutional thinking, our thinking about individual rights, has always been very good at acknowledging those disagreements.

We also disagree about how people who disagree about so many different issues should live together. We disagree about the terms on which they should live together. We disagree about the structure of a just social framework for their relationships. We disagree about what rights they have against one another. We don't just disagree about the good; we disagree about rights and justice as well.

I believe constitutional theory has been rather less good at acknowledging that—not that anybody denies it. On the contrary, it is patent. In law review articles and constitutional law textbooks, constitutional decisions are replete with savage and continuing disagreement about what rights we have or how to understand and interpret the rights we have, what rights ought to be included in the Constitution, or how to understand and interpret the rights that undoubtedly are included in the Constitution. We talk in constitutional theory, and we talk in political theory, as though those disagreements were somehow

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1. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

less of a problem than disagreements about the good. But they are not; they are more of a problem because so far as the disagreements about the good are concerned—disagreements about God and lifestyle and so on—we can afford to agree to differ on all that.

But we cannot afford to agree to differ on the questions of justice and rights. We need to have those things settled. We need to have it settled exactly how much accommodation must be provided for a minority religion. We need to have it settled exactly how far free speech rights should extend. We need to have it settled exactly how far a particular minority should be immunized from a majority decision. These matters will not go away. They are urgent. They are important, and the more we disagree about the good, the more we need to agree, or the more we need to at least settle something at the level of rights and at the level of justice.

But of course, the fact that we need a settlement on the issue of rights doesn't make it any easier to get that settlement. It's infantile to think that the mere need for a settlement makes the disagreement about the terms of the settlement go away. So we have to think a little bit about the political procedures or processes by which we are to allow settlements to emerge and stabilize in the area of justice and individual rights. If we live in a society where people disagree about what rights we have or about what the rights we have mean, we have to figure out some processes whereby some determinate set of answers can stabilize and provide a framework even in the face of those disagreements. We have to settle on certain political procedures to handle inputs from people who hold disparate positions about this, all of whom are convinced that they have the right answer about rights and justice.

You see, most of us when we write about rights and justice write as though there were a truth to the matter. "And thank God we have got it in this article. Thank God we got hold of it in this book." It's an honorable thought. The idea of an objective right answer to these questions is not inherently disreputable. I have some doubts about that which I express in the middle of the book,² but I believe those doubts are irrelevant to this issue. Because we are not dealing with a bunch of relativists; we are dealing, instead, with a situation where people disagree with one another, but each believes they have the right answers. So simply saying, "Let the right answer prevail about individual rights; let the truth about rights prevail," will not settle our differences, because everybody gives a different content to that partic-

2. See *id.* at 106–20, *passim*.

ular point. Therefore, what we need are some political procedures to settle the matter, which do not, as it were, presuppose that the matter has already been settled. These political procedures must be capable of operating and yielding determinate conclusions despite our disagreement about what the conclusion should be.

Now, there are obviously a broad range of possibilities, and I'll set out just two in order to simplify matters. One possibility (the possibility I favor) is that the members of the community who all take themselves to be the subjects of rights, the people who are supposed to have the rights, the people whose relations to one another are supposed to be structured by this just set of rules, should settle the matter among themselves by debate, deliberation, and voting, or by complicated mechanisms of representation and legislative deliberation and voting.³ I don't suggest that these need to be settled by plebiscite, or plenary initiative, but the one idea I find very attractive is to allow the rights-bearers themselves to participate in a process that, at every stage, reflects a conviction that they are equally entitled to participate in the debate that determines what their rights are. And when they settle some matter by voting on equal terms, in ways that are mutually respectful of each others' different views, then that settlement should stand.

The alternative is a version of the above-described system that is radically qualified by superior voting weight accorded to a small council of judges. This small group has the ability to override or set aside settlements reached among the citizens and their representatives on the grounds that the judges believe the settlement is wrong.⁴ It should be clear that this is not an alternative to voting: the disagreements I have been talking about are as endemic among the judges as among the population generally. So the judges, too, will have to deliberate, discuss, and vote to reach their conclusions on this matter. We are not talking about replacing a majoritarian process with a non-majoritarian process; we're talking about replacing a majoritarian process conducted among the quarter-of-a-billion rights-holders in the country and their representatives with a majoritarian process conducted among the nine men and women on the Supreme Court.

In one case, extremely complicated majorities are formed and sustained across extremely complicated sets of institutions—all of

3. These representative mechanisms, of course, are in some sense a reflection of the underlying ideal of debate, deliberation, and voting among the members.

4. The grounds for judges to set aside citizens' and representatives' decisions could be that the latter have either wrongly interpreted the Constitution or wrongly interpreted the construction of a just scheme generally.

whom are answerable to and all of whom exist in the spirit of equal participation by all citizens. In the other case, discussion and majoritarian voting take place among the nine men and women of this high council, the Supreme Court. And a vote of five defeats a vote of four, irrespective of whether the four people are convinced that the right answer is represented by the majority.

These disagreements about rights happen not just among citizens and legislators and judges—they also happen among political and legal theorists, among the people in this room, among philosophers over in the philosophy department, among people who write books about rights—each of whom tries as hard as they can to develop well-worked out answers, definitively, to the question of what rights we have and what the truth about rights should be. One thing I want to ask everyone here to consider is: how should we think about those contributions by scholars? Should we regard them as an idealization?

Here's one possibility: they are idealizations of particular contributions that a citizen or a representative might make in a debate conducted among the citizens. Citizens will articulate various views about rights. Some of them will be more elaborate, more articulate, more thoughtful, more philosophical. What the philosopher does in his or her study is simply an idealized version, an extraordinarily sustained and elaborate version, of what the ordinary citizen does when the citizen contributes a view about the proper scope of the First Amendment. A second possibility is that we should regard these as idealizations of the opinions that might be formed by the ideal judges.

Again, though, whether regarded as an idealization of a citizen contributing on equal terms with other citizens, or an idealization of a judge contributing on equal terms with other judges, neither of these models denies the fact of disagreement. The scholar knows that the other scholars down the hall disagree with him about rights. And his work is an idealization of a contribution to a disagreement about rights—either a citizen's or a judge's input into civic or judicial disagreement. And once again, such a contribution could never be dispositive on its own, it would have to face off against other similar contributions and the issue would have to be resolved by voting.

Now, as I said, there is disagreement about what makes life worth living, there is disagreement about rights, there is also disagreement among us about the appropriate procedures to use. I hold a particular view about political procedures, which is the one that I outlined a moment ago: a desirable set of political procedures is one that is formed and elaborated in a way that gives equal weight to the preferences and opinions of all of the quarter-billion citizens of the country whose

rights are in question. And I believe that we need extremely strong arguments to be persuaded away from some form of deliberation and majoritarian voting that treats the opinions of those citizens as equals.

Another question is, what is this book supposed to be a model of in relation to what goes on in the political process? The same two possibilities exist: is this supposed to be a model of a particular citizen's contribution to a debate that citizens might have about what their political procedures should be, or is it supposed to be a model of or an idealization of some judge's verdict on what the appropriate set of political procedures should be? Again, I stick with the first. This is supposed to be a particularly articulate civic contribution to a debate that the citizens might reasonably have among themselves about the terms on which their debate about rights should be conducted. In other words, I believe that citizens are not incompetent to address and debate what their own political procedures should be. I don't at all accept the view that, as it were, democracy should be imposed on them by either a colonial ruler or by a council of judges, any more than I think any particular view about rights should be imposed on them by a colonial ruler or a council of judges. The people are entitled to think for themselves about the issue of justice, and they are entitled to think for themselves about the issues of procedure that are necessarily raised when they disagree about justice.

The one other preliminary point that I want to state right at the beginning respects a source of misgiving that you might have about the possibility I have outlined. The misgiving is that, if you entrust these issues to the people, the people may get the matter wrong. They may come up with views that are inappropriate or even tyrannical. And we are quite familiar with the idea of the "tyranny of the majority."

What I want to leave you with is a very important distinction between the decisional majority and the topical majority. The decisional majority is the group of people whose numerical strength is sufficient to decide an issue. So, for example, on most issues of constitutional adjudication the decisional majority is five or more Justices on the Supreme Court. The decisional minority are the Justices who lose. As far as I can ever remember, in my whole life, I have been in the decisional minority on every issue on which I have voted. But the fact that I am in the decisional minority does not mean that anything tyrannical has happened. It simply means my opinion has not prevailed. Whether anything tyrannical happens depends not on what happens to the decisional minority, but what happens to the topical minority.

Issues of justice (free speech, religious freedom, the rights of suspects) often involve questions about how the interests of the members of large sections of society should relate to the interests of discrete minorities in society. These are distinctions between the topical majority and the topical minority, the broad range of interests that are at stake on one side, and the smaller range of interests that are at stake on the other side. Tyranny happens when the interest of the topical minority is given less weight than it ought to. Tyranny happens when the interests of the topical minority are slighted or oppressed.

But patently, on almost every issue that you can think about, the decisional majority doesn't necessarily line up with the topical majority, and the decisional minority doesn't necessarily line up with the topical minority. These categories cut across each other, so that abortion rights are concerned particularly with the rights of a very large minority, a minority of women who are in danger of experiencing unwanted pregnancies. But some of those women are members of the decisional majority in favor of laws that would restrict abortion, and a great many men are members of the decisional minority on laws that would restrict abortion. People may line up in different ways, but you don't simply have people voting their interests, and when you have a political system where people don't just vote their interest, but vote for their opinions about justice, you cannot guarantee that simply because a society that divides into minorities and majorities necessarily means something bad is happening to the topical minority.

So please, in all our discussion of the possibility of the possibly tyrannical consequences of majority voting, bear in mind this distinction, and bear in mind that the particular danger, which is not removed by anything that I've said, that the particular danger of the tyranny of the majority is a danger that occurs only when the decisional minority finds that its interests as topical minority are slighted by an identification of broader social interests with the interests of the decisional majority. Now, I'm going to leave it there because I think I'm out of time, but that's sort of stage-setting, I think, for the debate and now I will wait and see what my companions on the panel have to say.