

# JUDICIAL RIGHTS TALK: DEFECTS IN THE LIBERAL CHALLENGE TO CONSTITUTIONAL REVIEW

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## ABSTRACT

A treatment of recent criticism of judicial review concentrating on its theoretical consistency, scope and the use it makes of factual premises regarding the composition of judicial argument and the practice of democratic assemblies. Focussing on the work of Jeremy Waldron and Mark Tushnet and to a lesser extent that of Thomas Poole, it concludes that there are serious difficulties with the liberal challenge on each front.

## I INTRODUCTION

Since the second half of the twentieth century, judicial review of legislation has generally been regarded as a liberal institution.<sup>1</sup> Given this perception, judicial review was always going to be particularly vulnerable to a liberal contestation of its legitimacy. In recent years, two scholars of impeccably centre-left credentials, Mark Tushnet and Jeremy Waldron, have led a challenge against judicial review which questions its ethical sufficiency as an instrument for designing legal outcomes.<sup>2</sup> This critique has become increasingly influential in liberal legal discourse — perhaps because in contrast to conservative criticism of ‘judicial activism,’ it is not seen as politically opportunistic.<sup>3</sup> In light of the mounting credence afforded to the challenge, it is timely to assess its substance in some detail.

The basic content of the liberal critique is that within certain democracies,<sup>4</sup>

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1 I use ‘liberal’ to denote the centre-left of the political spectrum in relation to civil liberties, welfare, equality etc.

2 J Waldron ‘The Core of the Case Against Judicial Review,’ as presented at University College, London on 16 March 2005 in draft version, <[www.ucl.ac.uk/spp/download/seminars/0405/Waldron-Judicial.pdf](http://www.ucl.ac.uk/spp/download/seminars/0405/Waldron-Judicial.pdf)>; *Law and Disagreement* (1999); ‘On Judicial Review’ (Summer 2005) *Dissent Magazine* np, <[www.dissentmagazine.org/article/?article=219](http://www.dissentmagazine.org/article/?article=219)> (this is also interesting for indicating an explicit meeting of minds between Waldron and Tushnet), ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 *Oxford J of Legal Studies* 18; M Tushnet ‘Democracy versus Judicial Review’ (Summer 2005) *Dissent Magazine* np, <<http://www.dissentmagazine.org/article/?article=248>>, *Taking the Constitution Away from the Courts* (1999).

3 Anecdotally, my impressions of Oxford Law Faculty’s almost uniformly liberal postgraduate community certainly suggest a growing enchantment with Waldron’s critique.

4 For Waldron, those possessing (i) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (ii) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual law-suits, settle disputes, uphold the Rule of Law, etc.; (iii) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (iv) persisting, substantial, and good-faith disagreement about rights (i.e. about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.’ ‘The Core of the Case’ (note 2 above) 13.

the views of elected bodies should trump those of unelected bodies, such as courts, because they constitute a product of popular morality.<sup>5</sup> The argument goes that since people disagree about rights, the tenets of popular morality enjoy greater legal legitimacy than those of critical morality. It is not my intention to make a case for judicial review on any basis — moral or instrumental. My only object is to set out certain deficiencies in the recent challenges to it. This is not to suggest that the burden is on Waldron et al to establish why judicial review should not exist in circumstances where a system of government is being designed from scratch. Whatever defence judicial review receives in this article is contingent on the subsistence of a substantive justification for it.

The defects of the liberal challenge are considerable. The two primary theoretical problems that emerge are incoherence and a lack of ambition. These are exacerbated by a flawed use of empirical information regarding the practice of democratic assemblies and the composition of judicial argument.<sup>6</sup> I will address these issues in turn.

## II THEORETICAL COHERENCE

The first point to bear in mind is that the challenge itself is based on a tenet of critical rather than popular morality, namely, that political self-determination<sup>7</sup> should be an individual right.<sup>8</sup> However, when critics of judicial review can point to a particular act of self-determination, such as a constitutional referendum or an election with high rates of participation, their critical moral emphasis is conflated with a popular moral emphasis on self-determination. This is because both elite and popular moral emphases happen to coincide.<sup>9</sup> Yet even when both approaches are

5 Crudely put, popular morality is constituted by the ethical beliefs of a popular majority whereas critical morality is constituted by the ethical beliefs of an elite.

6 In relation to the composition of judicial argument, I deal with the case made recently by Thomas Poole against the individual rights rationale for judicial review. Given the alternative justification he proposes for review, Poole could not be characterised as a full member of the liberal challenge, but he rightly notes several points of contact between it and his own body of criticism — see note 53 below.

7 It is important not to confuse political self-determination with political self-expression. Of course, self-determination is exercised through ‘expressing’ a vote and is facilitated by the community’s enjoyment of the freedom of expression prior to the vote, but crucially, self-determination is the act of *deciding* one’s political destiny.

8 This is made apparent by Waldron in ‘The Core of the Case’ (note 2 above) 30-31. There is tension in Waldron’s description of the ‘imperative’ nature of the right to participate in ‘The Core of the Case’ and his treatment of it at 232 of *Law and Disagreement* (note 2 above) as not having any ‘moral priority’ over other rights, such that ‘talk of *conflict of rights* is inappropriate in this sort of case.’ Be that as it may, Waldron does not acknowledge any revision of opinion and since his analysis in *Law and Disagreement* is still cited as his view (and an argument winner at that) in for instance A L Young ‘A Peculiarly British Protection of Human Rights?’ (2005) 68(5) *Modern LR* 858, 970 and since *Law and Disagreement* provides more detail on this point than Waldron’s recent paper, I tackle both. Likewise, Tushnet makes the point in ‘Democracy Versus Judicial Review’ (note 2 above) that ‘the basic principle, of course, is that people ought to be able to govern themselves.’

9 Assuming that an act of self-determination by a given electorate indicates not only its views on the particular question submitted but also its wish that its views be taken into account.

in sync, they represent different types of moral calculation. Indeed this categorical difference is central to the liberal challenge to judicial review.<sup>10</sup>

The elitist derivation of Waldron's argument can be seen more clearly in cases where he diverges from popular opinion. In suggesting that his case applies to Canada and the US,<sup>11</sup> Waldron persists in closing his eyes to the implications of the fact that the Canadian and American peoples either instituted judicial review, or have spent more than two centuries of elections abiding by it. Were Waldron actually following his advice of respecting the will of reasonable people as to how they wish to be governed he could not criticise the undemocratic character of judicial review in those democracies which have adopted it. In reality, Waldron presents us with a proposition for changing the locus of rights protection from the judiciary to the legislature because it would represent a *better* system of government, not because the current system represents an undemocratic morality. In other words, Waldron is second guessing the people in the same way in which his target — judicial review — necessitates the second guessing of their representatives. Similarly, assertions that a state is undemocratic to the extent that its electorate continues to disagree with you, on formulae of government or otherwise, is hardly indicative of the healthy democratic respect for disagreement which predicates the new liberal challenge. Below, I examine a number of attempts to address this issue, but we shall see that the incoherence in the liberal challenge to judicial review remains evident, to wit, its premise that popular morality trumps critical morality rests on a critically (and sharply) defined piece of morality, namely a particular conception of self-government.<sup>12</sup>

In *Law and Disagreement*,<sup>13</sup> Waldron poses an interesting approach to this problem by characterising democratic decision making as the correct method of making decisions about rights not because the individual has a right per se to participate in her system of government but because participatory majoritarianism is 'peculiarly appropriate' to the task or 'the most natural' way of doing so. Waldron thereby attempts justify the maintenance of a non-judicially reviewable representative legislature while distancing his theory from critical moral judgment.<sup>14</sup> Ironically,

10 Recall that the liberal challenge is based on the putative ethical distinction in a polity's use of the products of critical and popular morality given its internal disagreement on moral issues.

11 'The Core of the Case' (note 2 above) 10-11.

12 I should note that there is a body of scepticism about the whole notion of deriving a mandate for democracy from the idea of the individual having an interest in political self-determination, see for instance J Raz 'Free Expression and Personal Identification' 11 *Oxford J of Legal Studies* 303, 309. If this line of scepticism is justified, a liberal challenge to judicial review based on honouring such an interest could not succeed. Raz's criticism is not unproblematic though discussion of it lies outside the scope of this article.

13 Note 2 above. See generally chapter 11.

14 Waldron, at least in *Law and Disagreement* mode, would object to the characterisation of his justification as 'instrumental' since he criticises instrumental theories of authority. Indeed, it is precisely his characterisation of the right to participate as deriving its justification from neither instrumental nor moral grounds which provides the illusion of analytic coherence.

Waldron provides effective criticism of various consequentialist methods of deciding what rights a society should enjoy<sup>15</sup> — that such justifications require an unacknowledged moral description of what ‘good government’ actually is. But he remains inattentive to the relation of such matters to his own theory of authority.<sup>16</sup> There is no doubting the ingenuity at play here; Waldron simply states that people are entitled to some kind of moral treatment but differ as to what that should be, and goes from there to saying that the products of popular morality are more legitimate as laws over people than the products of critical morality, without having ever staked himself to a particular postulate of either.

But it cannot work. In support of the ‘appropriateness’ of participatory majoritarianism, Waldron tells us that

it is impossible . . . to think of a person as a rights-bearer and not think of him as someone who has the sort of capacity that is required to figure out what rights he has. . . . 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.<sup>17</sup>

A better definition of human autonomy would be hard to find. Individual, active, thinking beings should have a voice in decisions about their treatment because there is no other way in which such decisions could provide morally correct outcomes. We find a moral postulate — the importance of respecting of individual autonomy — and we find an instrument for realising that postulate — giving each individual an equal say in decisions about their rights. In other words, we have a critically predetermined moral destination.

It is useful to look at the implications of the ‘appropriateness’ justification. The problem is not simply that people disagree whether democracy is the right procedure to reach morally correct outcomes or whether democracy itself is moral.<sup>18</sup> Any such disagreement may result from people’s failure to appreciate the ‘peculiar appropriateness’ of democracy to resolve such issues. On his own terms, Waldron owes no moral regard to the fact of popular disagreement as to the correct theory of political authority. On the contrary, he characterises himself as marshalling the legitimacy of popular morality against judicial review without having committed himself to anything more than a rational observation — that participatory majoritarianism is peculiarly appro-

15 See in particular *Law and Disagreement* (note 2 above) 252-254.

16 On this point, see also J Raz ‘Disagreement in Politics’ (1998) 43 *American J of Jurisprudence* 47.

17 *Law and Disagreement* (note 2 above) 251.

18 See for instance the arguments of C Fabre in ‘The Dignity of Rights’ (2000) 20 *Oxford J of Legal Studies* 271, 275-6, ‘A Philosophical Argument for a Bill of Rights’ (2000) 30 *British J of Political Science* 77, 93 and T Christiano ‘Waldron on Law and Disagreement’ (200) 19 *Law & Philosophy* 513, 520.

priate for making law. Moreover, producing incontrovertible counter-arguments that ‘prove’ the pragmatic failure of participatory majoritarianism in any or all scenarios does not deal with Waldron’s case because he is talking of a special form of right — ‘the right of rights’ — rather than simply the best way of producing good outcomes.<sup>19</sup> A key element of Waldron’s argument is that it claims, at least when at its strongest in *Law and Disagreement*,<sup>20</sup> to make neither an instrumental or normative justification for participation. Until we prove the justification’s ultimate moral basis, the existence of popular disagreement with participation is irrelevant to our criticism. Nor is it pertinent that citizens may disagree on which form of democracy is best. There is no reason to believe that Waldron would not recognise its most appropriate version — at which point he would don the hat of rational observer rather than critical or popular moralist. Consequently, the mere fact of disagreement as to the best version of participatory majoritarianism cannot be used to say that in reality Waldron must make a normative procedural choice.

The difficulty with Waldron’s argument is that the best reason he gives for using participation — that respecting the rights of a rational entity would only be an *intelligible* endeavour if we thought the entity worthy of participating in our decision as to how to respect his rights — is based on a normatively contestable proposition. Framing in terms of intelligibility suggests a question of logic rather than morality. But the treatment of others in a manner that is moral by its own lights while ignoring the views of those treated is a perfectly intelligible activity. To say that humans are individual rational agents and that this autonomous rationality should somehow define how their rights are determined is effectively the same as advocating a right of self-determination — the consummation of individual rationality. Respect for individual rationality is a moral proposition at odds with many other moral propositions as to what rights humans deserve to possess. Various religious movements would place far more emphasis on what morality God decrees for his creations. It would make no sense for such movements to see a decision making system which respected individuals ‘as active, thinking beings’ as a morally neutral one. Divine instructions might very well take the moral treatment due to people seriously but consider them, or some them, too morally immature to understand the nature of their proper treatment. Likewise, if rights were to be group oriented, it might be immoral to give each

19 ‘Not only does it not face the question-begging difficulties of rights-instrumentalism, it [participation] also has the advantage over the latter that it does not consecrate forms of authority which are radically at odds with those entrusted to rights-bearers in the . . . contemplation of their rights. In this sense, we can plausibly say that participation is the rights theorist’s most natural answer to the problem of authority and disagreement about rights.’ *Law and Disagreement* (note 2 above) 254.

20 See *ibid* ss 6 & 7, chapter 11.

individual member of the group, perhaps an extended family, an equal say in the making and remaking of them.

But let us ignore for a moment the initial deck stacking brought about by the choice of participatory majoritarianism. Even if a humanistic secular philosophy comprised the universe of possible moral decisions, why would an elite group not be better placed to decide on them than every single human being of majority age — many of whom are dim, ignorant or both?<sup>21</sup> In response to this, Waldron invokes Locke's dislike of 'academic casuistry' in preference to the 'clear thinking' of ordinary voters.<sup>22</sup> But no one engaged in casuistry, sophistry or artifice is thinking unclearly. On the contrary, they know exactly what they want — why else would they desire to dissemble? This kind of objection to only allowing intelligent or educated people to make decisions about rights could only stand if we were to assume that such people are somehow more likely to be hypocrites than those who are not fortunate enough to possess intelligence or education. Against instrumentally justified elitist systems, Waldron also makes the general point that, '[p]eople disagree 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.'<sup>23</sup> This observation is true in relation to most, perhaps all, instrumentally justified systems but problematically, it begs the question in relation to itself. Why should Waldron have the instrumentalist instruction he rightly criticises read 'Confer the authority to resolve these disagreements on *those* persons and procedures most likely to yield the right answer', instead of 'on *any* persons' (i.e. including popular majorities)? The answer could only be that the author believes in a fundamental individual interest in political participation which can only be achieved by the instrument of participatory majoritarianism. It does not appear possible, and is inconceivable in Waldron's case at any rate, to neutrally designate a universal franchise as the moral decisionmaking procedure or to characterise it as the zero point in relation to which our propositions develop moral colouring. Consequently, the claim that democracy is the most rational way rather than the morally best method of determining rights is ultimately just a trick of light which cannot undo the critical moral undercurrent to Waldron's thesis.

The other element of cover sought by the liberal challenge is in relation to the apparently widespread popular approval of judicial review. Waldron provides a detailed account of this position in *Law and Disagreement*.<sup>24</sup> His argument that a political community cannot

21 This is not an expression of snobbery, simply a questioning of democracy's 'rationality' for the purposes of determining rights in the absence of a precommitment to a right to vote.

22 *Law and Disagreement* (note 2 above) 253.

23 *Ibid* 254.

24 *Ibid*, see chapter 12 'Disagreement and Precommitment.'

democratically pre-commit to a counter-majoritarian input into the generation of law works to disguise the elitist moral premise of his case by implying that the operation of judicial review is not itself a product of popular morality. It is worthwhile summarising its key elements. First, Waldron differentiates between the reason for carrying out a proposal and the character of the proposal itself.<sup>25</sup> In other words, although we should implement judicial review if it has been democratically enacted, we should not imagine it as being democratic in nature simply because it has been so enacted. Second, he distinguishes between external causal mechanisms and external judgment.<sup>26</sup> The idea here is that whatever may be said for an electorate's continued ownership of a decision at T1 not to allow itself to do X at T2 where it has committed the means of prevention to a machine, it is not reasonable to suggest that the community continues to own the preventative decisions of an external human agent where the definition and application of X are as vague as a constitutional text. Third, that it is 'ludicrously problematic' from a democratic perspective to assign difficult decisions on rights to an unelected body whose members disagree on the content of such rights along the same lines as the elected body.<sup>27</sup> Fourth, that procedural rules about rights are different to substantive rules about rights in a way which allows the former to retain their democratic character despite being constitutionalised.<sup>28</sup>

All four arguments miss the mark. Waldron's first point is undoubtedly true. As a defence of his democratic criticism of judicial review, however, it is irrelevant. Essential aspects of the character of any proposal for governance are the parameters it sets for its introduction and abolition. In the case of the mature democracies that constitute Waldron's primary targets, the proposals for judicial review, accepted by the electorates, were evidently premised on both the condition of democratic approval and the condition of abolition at any time by democratic rejection. The character of proposals for judicial review as an element of government cannot be fully appreciated in the absence of such information. For instance, would we consider democratic a proposal for judicial review which, though conditioned on democratic acceptance, presents itself as irreversible by any future electorate? Perhaps, but an observer would certainly find such 'irreversibility' germane to his understanding of the nature of the proposal. Consequently, we cannot simply put the matter of judicial review's democratic conditionality to one side when analysing whether its contribution to government is democratic in character.

25 Ibid 255.

26 Ibid 260.

27 Ibid 270.

28 Ibid 276-277.

Not only is the impact of such conditionality relevant to the character of judicial review, it is arguably decisive. Some kind of majority rule is a defining characteristic of government under any conceivable theory of democracy. The form of the majority rule allows us to determine when a given electorate is speaking as a political community on a given issue. There are different types of majorities and hence different formulations of the rule. But majority rule would have no meaning if it did not encompass decisions made by an electorate that are reversible by an equivalent electorate at any time. Where the majority has untrammelled control over the introduction, form and continuance of judicial review, it therefore becomes difficult to maintain that proposals for judicial review are undemocratic in nature. To do so, you will almost certainly need a set of fundamentals with which to refine the definition of democracy. But using fundamentals to claim that the majority's acts are not truly democratic in character (and are therefore illegitimate) is precisely the approach against which Waldron initially set his face.

Certain democratic objections to judicial review remain however. For instance, the argument could be made that while an electorate's acceptance of judicial review in a specific act may meet democratic standards for a certain period, no given electorate has the power to alter, albeit non-bindingly, the degree of remove between future electorates and the agents exercising their sovereign powers. Presumably, this limitation would rest on some conception of self-determination which considers illegitimate any pre-existing constitutional scenario that qualifies the exercise of the individual's freedom of choice. However, as a defence of the powers of an assembly, it turns the theory of parliamentary sovereignty on its head. It would require that all legislation granting the Executive the power to make legal rules expire with each parliamentary or congressional session. Likewise, agencies set up by parliament, or indeed the Executive,<sup>29</sup> would dissolve with the completion of each electoral cycle. All this would be required because otherwise the precise remove between the electorate and the decisions made in its name would have been altered — in most cases not even directly by a former electorate but by its representatives. Indeed, it is not obvious why this logic should not also extend to non-power granting laws made by previous electorates. What relevant differences are there between a democratic act which binds a future electorate not to smoke in public houses, unless it decides otherwise, and one which delegates that electorate's power to make decisions on environmental standards to a particular agent, again for the time being?

Likewise, one might argue that it is *ab initio* undemocratic for any electorate to institute judicial review no matter how narrowly democratic the constitutive act. This restrictive conception of democracy is based on

29 And arguably the nominations made to those agencies.

the idea that, like a sovereign parliament, an individual's political autonomy is so vital at every given moment, that it is not capable being bound, even by itself in a previous moment. But if it is illegitimate for a democratic electorate to delegate rule making (or rule breaking) power to a subsidiary judicial authority, a host of questions arise. How could any non directly elected official whose tenure is not explicitly tied to the lifetime of the current parliament wield any form of government authority? It is of no use to say that such officials or agents have been chosen by and are answerable to representative institutions — so too are the courts to the sovereign electorate. Perhaps no government in history could pass for democratic under such a theory of democracy.

At this point, it is worth analysing what exactly the electorate wants when it commits at T1 not to do X at T2. The idea that the people have two orders of desire at T2, one to do X and the other to stick to its earlier commitment, is nonsensical. The electorate either wants X or it does not. Apparent disagreement among the electorate as to what means is immaterial; having enacted judicial review, the electorate has clearly established what X means at any relevant point, namely, whatever the constitutional court, given its understanding of the constitution, says it does. For now, all we are concerned with is whether the electorate can coherently reserve a ballpark conception of a right against legislative violation.

By setting out in its constitution that it does not want X to be done unless and until the constitution is amended, the electorate has made a clear signal of democratic intent. When the electorate's parliamentary representatives decide nevertheless to do X and are prevented from doing so by the constitution, the undivided will of the people has been affirmed. It is no use to say that parliament was elected more recently by the people and is thus a better barometer of their opinion as to X. The people themselves established what the barometer of their opinion for X would be, namely, the constitution. No one can say that the people have changed their minds on X until they choose to express that development in the way they freely elected to make their exclusive means of doing so. It might be argued that surely if a party gains power at an election on a manifesto of legislating for X, there can be no doubt that democracy calls for such legislation to be passed. But this too is wrongheaded. If the majority of the electorate truly wanted X then all that would be necessary is for them to vote to change the constitutional prohibition of X using the amendment provisions chosen in their constitution. The constitution was the democratically chosen litmus test for X, so the question is not why they voted for the pro X party in the general election if they did not want X, but why did they decline to change the constitution to allow X, if that is indeed what they wanted.

If a supermajority is required to amend the constitution to remove the X prohibition, the results of the latest general election are likely to remain

irrelevant as to the electorate's views on X. For example, if the same supermajority is required to constitutionalise the prohibition as is required to remove it, the electorate is speaking as a political community when it declares its representatives incompetent to permit X, despite any subsequent contrary simple majorities. This is a result of the coherence between the magnitude of the majority rule used to record the electorate's choice to use a special majority rule for particular questions and the rule thereby enacted. However, it is more difficult to imagine the electorate to be speaking as a body if it constitutionally prohibited X by simple majority while requiring a supermajority for its amendment. In the event of a contrary simple majority, at least in an attempted amendment, questions might duly arise as to what the electorate actually wants to do with regard to X. Nevertheless, occasions where the majority rule is materially more demanding for the amendment of a constitutional provision than the rule applied in the provision's original ratification or amendment seem scarce.

The fact is, of course, that it is materially easier for an electorate to drive law making via elected institutions than via constitutional amendment. This is particularly the case under the US Constitution which sets out an onerous amendment procedure. Some legal theorists consider this fact relevant to the proper construction of constitutional theory. Intuitively it seems correct to conclude that parliamentary legislation is more democratic than the law making opportunities offered by constitutional amendment. But this is not the case. The greater material difficulty in law making by constitutional amendment can be legitimately characterised as a product of the sovereign electorate's democratic wishes. To take the US Constitution as an example, article 7 specified that the ratification of nine of the thirteen original states was required for it to be established (along with its amendment provisions) as between the ratifying states. This proportion of agreement within the prospective polity is roughly comparable to that required under the amendment clause. Consequently, we can hardly maintain that an earlier electorate stacked the democratic deck on the matter of constitutional law making such that the amendment clause they ratified did not represent the American polity's collective view on the matter. Nor is it plausible to deny that the amendment clause remains 'the people's' sovereign choice. If we were to dispose of the amendment clause for nothing other than the fact that it was originally chosen by a long dead electorate, what would become of the rest of the document? Appealing as 'material' differences in degrees of democracy appear at first sight, they cannot readily be set against each other in a debate concerning law or political legitimacy.

Waldron's second argument against the democratic credentials of judicial review is that an electorate's decision to constitutionalise a bill of rights under judicial protection gives it little control over the decisions

actually made by judges on its typically abstract clauses. This too is perfectly correct; but neither here nor there. The irrelevance of the point is not due simply to the fact that human discretion and disagreements over the morality of rights are an inevitable part of judicial review. If that were the only reason, an argument could be made the lack of control is too great a cost in democratic terms. The problem is that Waldron misconstrues what is actually being determined by the people when they establish judicial review for constitutional rights.

When the electorate institutes judicial review for certain broadly formulated rights, it is not deciding to have particular future laws struck down for specific, detailed reasons. Instead, the people are deciding to allow persons appointed in the manner set out in their constitution to act as judicial reviewers of legislation for its compatibility with the principles and policies chosen by these judges as informed and bounded by the text of the constitution. No more, no less. As such, the decision at T1 to give the means to a constitutional court to prevent X at T2 is indeed a causal mechanism. In democratic terms, the constitutional grant to a judge of the power and duty to review legislation on her best understanding of the constitution is a necessary and sufficient condition of the future exercise of judicial review. Indeed, there may be few more causal relations than the gift of power and its subsequent exercise. There is no room for doubt as to what the effect of the electorate's choice at T1 will be — judges will review until they drop — hence the electorate retains ownership of its decision. Waldron claims that:

[I]t [judicial review] would not be a form of precommitment that enabled one to rebut an objection based on the importance of A's hanging on to his autonomy or, in the case of constitutional restraint, an objection on democratic grounds.

As we have seen, A hangs onto his autonomy as long as the judges keep reviewing while citing provisions of the constitution; hence this democratic objection fails.

We come now to Waldron's notion that it is 'ludicrously problematic' from a democratic perspective to assign difficult decisions on rights to an unelected body whose members disagree on the content of such rights along the same lines as the elected body. This concern stems from a failure to correctly apply his first point, namely, that the reason for carrying out a proposal and the character of the proposal itself are different things. This is of course the case with judicial review. The standard reason, and perhaps the most compelling, to enact judicial review in a democracy is to help protect minorities from the prejudice of a careless majority. Unlike judicial review's democratic conditionality, the reason it is enacted by the electorate has categorically no relation to whether the character of the duly enacted judicial review is democratic.<sup>30</sup>

30 Unless we somehow manufacture a definition of democracy which contains *fundamental* prescriptions of the good society that would be violated by the institution of judicial review for the protection of minorities.

If it did, we might appreciate how inherently undemocratic it would be to allow unelected judges to trump the legislation of our elected representatives for the very reasons the parliamentary opposition voted against it. Were the rationale for judicial review to go to its democratic credentials, objectively establishing that courts are better than our elected representatives at figuring out the ways and means of minority protection would be relevant to defending it from criticism that it is undemocratic. When judges and parliamentarians have such similar disagreements fuelling their conclusions on how to discharge that challenging mission, it is difficult to rate courts as the substantively more competent forum. Of course, it can be argued that courts are superior since they benefit from security of tenure — an argument that rests on the assumption that an electorate which constitutionally protects minorities is legislatively indifferent to them. Such indifference may well be true from time to time, but it can hardly be used to win an argument that judicial review is democratic in character.

Indeed, unlike the unitary nature of an electorate's democratic desires when it elects a parliament which sees its legislation struck down for a constitutional violation, there may well be conflict in its ideas when it comes to why judicial review should be enacted. An electorate may not fully trust itself with minority rights, yet it might allow the appointment of judges from the echelons of the state's established majority. Crucially, such potential contradictions within its reasoning do not interfere with an electorate's unitary democratic voice that it wants whatever legislation is created by its representatives to conform to broadly defined constitutional norms and that any contrary legislation be struck down by a constitutional court according to its best lights. The issue is whether judicial review can properly be considered the product of a democratic theory of political authority, not whether such a theory has been operated for sensible or coherent reasons. As the rationale for judicial review is irrelevant *vis-à-vis* its democratic character, a defence of its democratic credentials does not have to establish that courts are more competent than legislatures at protecting minorities. That is a question to put before an electorate.

Consider Waldron's comparison of parliamentary regimes which have enacted judicial review to dictatorships, which do not value equality, respect or voice.<sup>31</sup> Even if we were to grant that the detail of Waldron's theoretical argumentation is generally persuasive, the bigger picture would surely refute it. Countries with judicial review such as South Africa, Canada and much of Europe can hardly be characterised as not caring about political equality or voice — if that were so, why did they bother establishing all manner of elected authorities, such as legislatures and presidents, whose decisions for almost all purposes define how the

31 'The Core of the Case' (note 2 above) 53.

state is governed? A rather more likely explanation is that the commitment of the electorates of such countries to the principle of self-determination takes a different shape to that of Waldron. This difference is precisely the sort of disagreement about rights which the liberal challenge celebrates as not only reasonable but as a reason for letting electorates make these kinds of decisions. The fact is that they already have.

Of course, where judges do not anchor their work in positive constitutional law, however much rope the latter's vagueness may furnish, Waldron's criticism regains its wheels as a genuinely democratic alternative. However, faced with judges citing constitutional provisions, Waldron's alternative cannot claim to supplant their role by noting the greater political legitimacy enjoyed by principles of popular morality and attempting to attach this greater legitimacy to *itself*. Instead, it must present itself as a critical moral vision — an argument for operating a jurisdiction's theory of authority in a particular direction (the abolition of judicial review), but not as an argument for criticising that theory as undemocratic or politically illegitimate. Nor can Waldron wash his hands of the incoherence by implying that even if we have to take a critical moral stance on how to resolve rights disagreements we cannot therefore assume that critical moralising is also appropriate on substantive rights questions.<sup>32</sup> This is not only nonsensical but contradictory. Nonsensical, because if it was legitimate to use a partisan moral position in determining a society's legal dispensation in one respect, it can hardly become illegitimate to continue using such positions when shaping its laws in other respects. In other words, the critical moralist cannot authoritatively choose when it is legitimate for others to critically moralise by appealing to no other theory of authority than his own sense of morality. Contradictory, because when a theorist is allowed use his moral position to inform his design of a decision-making procedure for rights, he is likely to be sensitive to his moral disposition regarding its outputs. In both 'The Core of the Case Against Judicial Review' and *Law and Disagreement*, Waldron himself makes the very same point,

Consider . . . 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 there are socio-economic rights and that they do place limits on property.<sup>33</sup>

In what might best be described as a final attempt to absolve his theory's incoherence, Waldron states that there is in any event an unavoidable

32 'The Core of the Case' (note 2 above) 26.

33 Ibid 28 and *Law and Disagreement* (note 2 above) 253.

need to find a decision making procedure<sup>34</sup> and that there are important moral reasons relating to legitimacy that arise because of disagreement and *do not arise apart from our addressing the question of decision procedures*.<sup>35</sup> Even if true, the relevance of this claim seems highly dubious.<sup>36</sup> But, in any case, the entire basis of Waldron's argument that democracy is the right decision procedure is that, in his own words, '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.'<sup>37</sup> The conflict here is palpable.

The second reason the new liberal challenge fails is related to the first but is not based on theoretical incoherence so much as a lack of ambition. In removing a broad, possibly total, swathe of potentially appropriate environments for judicial review from the ambit of their primary case, Waldron and Tushnet end up saying little. Waldron assumes that the societies in question are committed to rights or in Tushnet's words are 'reasonably decent.'<sup>38</sup> But these statements are meaningless unless we know or have a means of determining what exactly those rights are. There have surely been few societies in history which did not officially consider themselves to be 'committed to rights' of one kind or another. In order to draw any meaning from a declaration of commitment to rights we need to start asking normatively charged questions. But as soon as we do so, we find ourselves in the position of the philosopher kings which Waldron has set out to debunk. In other words, through holding on to a 'reasonability' filter such as a need for democratic societies to have made certain value judgments rather than others, Waldron is staking out for himself the strongest ground occupied by the defender of judicial review, namely that there are certain things which even majorities should not be allowed to do. This problem is made transparent by Waldron when he describes what he means by this assumption — not only does he mention the priority of specific kinds of values such as individualism, he goes on to list a number of sources from which the society's 'commitment to rights' must be drawn.<sup>39</sup> We end up with a set of fundamentals and methods of discovering them which the good society should uphold, in spite of the contradictory views or actions of its elected legislature. This, however, is the very attitude which Waldron criticises as democratically illegitimate when acted upon by a judiciary.

In his 'Core of the Case' paper, Waldron defends his assumption regarding a democracy's 'general commitment to rights' as reasonable

34 'The Core of the Case' (note 2 above) 26. But of course there is no more need a priori to find a decision-making procedure than there is to reach particular decisions.

35 Ibid.

36 See note 34 above.

37 *Law and Disagreement* (note 2 above) 252.

38 'Reasonably decent democracies can avoid illiberal abuses without having to call on the courts.' 'Democracy versus Judicial Review' (note 2 above).

39 'The Core of the Case' 18-19.

... given that the case for judicial review almost always assumes that somehow the society for which judicial review is envisaged has a Bill of Rights which stands in some real relation to the views of citizens.<sup>40</sup>

Waldron is correct in drawing a parallel between his own assumption and one which underpins most justifications of judicial review. In justifying the democratic character of judicial review, we noted above that it works on the basis of ballpark, yet positive, constitutional norms enacted by the people.

The difficulty with the analogy is that it does not necessarily matter that when making a case for X, a theorist relies on a premise which she criticises when it is relied on by the case against X. It all depends on the nature of the criticism. If one's criticism of the common assumption when made in the case against X is that it is internally inconsistent with the rest of that case, then it is of no consequence that one makes the same assumption in the case for X. This is precisely what is going on here: the liberal challenge says that judicial review is illegitimate because despite our democratic conception of self-government it means treating difficult questions of rights as matters to be resolved by an elite's morality instead of a people's morality. Basing such an argument on an assumption that the *democracy in question* is committed to individual and minority rights means substituting an elite/critical/personal morality for that of any number of people's moral views on rights. Thus the liberal challenge's assumption contradicts its argument. Hence, even if the commitment to rights assumption is used in justifying judicial review, the criticism of Waldron's use of that assumption in his case against judicial review still stands.

In Waldron and Tushnet's defence, it is fair to say that the considerable value they place on the principle of political self-determination leads them to set out fewer fundamentals that an electorate must abide by than many other liberal lawyers. But even to call this a 'numbers' game' in terms of moral fundamentals would overstate the difference between the two liberal schools of thought on judicial review: the fact that Waldron and Tushnet may advocate fewer moral non-negotiables becomes less significant when we factor in the weight of the premium they afford to principle of political self-determination relative to other moral positions.

### III VALIDITY OF FACTUAL FOUNDATION

The liberal challenge is not a purely theoretical rejection of judicial review however. A focus on its lack of utility for achieving outcomes is particularly evident in Tushnet's work.<sup>41</sup> His point is that the operation of judicial review in the US has made little positive difference to minorities and individuals. According to Tushnet, this is because

40 Ibid 60.

41 See chapter 6 of *Taking the Constitution Away from the Courts* (note 2 above).

generally speaking, judicial review has been successfully exercised only in a majoritarian context.<sup>42</sup> In the *Griswold* decision<sup>43</sup> which declared unconstitutional Connecticut's law against the use of contraceptives, the Supreme Court was merely 'acting on behalf of a national political majority that had not yet worked its will through legislation.'<sup>44</sup> Likewise, in *Brown*,<sup>45</sup> the court decision 'might be best understood as enforcing a national political view against a regionally dominant one that happened to have excessive power in Congress' — an excess which Tushnet puts down to the seniority of Southern senators and their ability to block non-race legislation for racist reasons.<sup>46</sup> Similarly, in *Roe*,<sup>47</sup> the Supreme Court was simply acting on behalf of a latent national political majority.<sup>48</sup> Unfortunately, none of these positions is defensible.

The national majority in favour of the legal use of contraceptives was irrelevant to Dr Griswold whose professional advice on birth control was subject to the criminal jurisdiction of the State of Connecticut. Of course, the broader point being made by Tushnet is that the Court does little independently of a clear national majority. But the *Griswold* Court's intervention against the majority of the relevant jurisdiction to protect what it saw as an individual right can hardly be characterised as a majoritarian impulse. Even at the national level, it was not simply a case of the court following the majority. On the contrary, though a majority of states and Congress may have been in favour of legalising contraception, an equally national majority had determined that matters of criminal law were for the several states to decide for themselves.

Likewise, in *Roe*, the Court so emphatically invalidated so many laws throughout the Union that counterfactual speculation as to what future legislative trends would have brought seems redundant. How could such speculation control for the totemic impact of *Roe* on national public opinion in relation to abortion? How could the number of women who exercised the 'right to choose' in the interim between *Roe* and the time its holding is speculated to have become law through nationwide legislation be accounted for? Moreover, bearing in mind that the *Roe* Court also struck down the national majority's view that such issues are, for federalist reasons, best left to the several states, how can the longstanding hostility to abortion rights in dozens of State Capitols be factored out of the 'latent national majority' equation? Indeed, one could argue that it is ab initio misleading to hypothesise about 'latent,' 'future' or 'background' legislative majorities since in the context of a state of law there is no conceptual substance to the notion of a binding public rule which has

42 Ibid 144-152.

43 *Griswold v Connecticut* (1965) 381 US 479.

44 *Taking the Constitution Away from the Courts* (note 2 above) 144.

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

46 *Taking the Constitution Away from the Courts* (note 2 above) 145.

47 *Roe v Wade* (1973) 410 US 113.

48 *Taking the Constitution Away from the Courts* (note 2 above) 147.

not undergone the requisite formality. A more fundamental objection to Tushnet's argument remains, however; it is best illuminated by his approach to *Brown*.

With *Brown*, we are told that the minority of racist Congressmen held too many legislative levers to allow the true majority get its way and abolish segregation. But these levers were in no way undemocratic — the reason some senators were more senior (and hence were more likely to chair committees) than others is that they were elected by the people more often. Likewise, the ability of racist Congressmen to logroll non-race bills is a par for the democratic course. Logrolling is a facility that has been extensively used by elected representatives everywhere, and still is. If the presence of these phenomena is sufficient for Tushnet to characterise a minority in Congress as having excessive power, then the system is broken. And if the alternative democratic system is broken, how can we object to judicial review on democratic grounds any longer? Especially when the most prominent subject left standing by the democratic breakdown is a subject on which the judicial branch is ready and willing to act.

In tackling the conventional theoretical justification of judicial review, Tushnet makes another outcome related point, namely that while in principle a minority will always lose up or down votes and may thus find itself prejudiced, in practice it will be able to selectively deliver its votes on the issues that matter to the larger parties in return for favourable consideration of its own issues.<sup>49</sup> Thus, judicial review is unnecessary to protect minority interests from majority prejudice. So, in contrast to Tushnet's earlier argument, we are now led to believe that logrolling is a remedial feature of democratic government rather than a cause for breakdown. The problem with this is that in order to roll logs you need to be in the log yard. In the US, the lack of election by proportional representation effectively removes this possibility. Whatever chance might have existed without PR is completely exhausted when we factor in the heavily slanted electoral districting that characterises American democracy. In an effort to address these problems, Tushnet points to the legislative successes that the African-American community achieved through becoming a 'core constituency' in the Democratic Party. But such legislative successes were hardly due to minority logrolling; the modern Republican Party has rarely felt the need to champion African-American causes due to minority electoral pressure since the African-American community was never going to vote for them. Bargaining within a coalition where you have no credible intention to join another is a zero-sum game, where the minority in question only picks up the influence its electoral numbers would themselves provide.

An outcome oriented point made by Waldron is that courts tend to be

49 Ibid 159.

less effective fora for rights' deliberation than legislatures because judges tend to focus excessively on the appropriate theory of constitutional interpretation and insufficiently on the relative moral merits of the right claims in question.<sup>50</sup> In the US context at least, this disproportion in the reasoning of written judicial opinions seems accurate. But it is a misconception of constitutional rights adjudication to regard the choice of interpretive theory as of no consequence to the moral analysis of the rights at issue. In order to interpret any text, a theory of interpretation is required. The choice of theory will be a moral decision. Some judges interpret the textually enumerated right in one way because of the value they placed on the liberty of contract<sup>51</sup> consummated at the time the contract was concluded. Some judges interpret the same textually enumerated right in a different way because of the value they place on the non textually consummated liberty of contract of each (succeeding) contracting generation of citizens. Yet other judges see themselves as bearing a moral responsibility to set out and apply the moral 'truths' intimated by the constitution's text, thus leading to different conclusions as to the content of the right. Moreover, the inconsistencies which arise in the application of these interpretative theories are, at least if academic debate is to be believed, often attributable to political and moral agendas. Moral and political agendas are precisely the kinds of value judgments that help define the relative moral merits of the interests at issue in a rights deliberation.

An analogous misconception lies at the heart of a recent article by Thomas Poole.<sup>52</sup> Unlike Waldron and Tushnet, Poole does not advocate the defenestration of judicial review in 'safe' democracies. However, he does launch a sustained attack on its individual rights rationale, suggesting instead a rationale based on assuring 'legitimacy' in government. Poole associates his own criticism of judicial review with that of the liberal challenge<sup>53</sup> and insofar as it is founded on a comparably deficient understanding of the treatment which rights receive in judicial deliberation it merits attention. His case against the traditional rationale is based on observations of how judicial review actually operates. But given the defective theoretical approach used for their interpretation, the observations are largely unresponsive to his thesis.

Poole's arguments are focussed in British constitutional law and assert that the classic rights rationale is inadequate because it cannot account for the importance and pervasiveness of non rights considerations in judicial rights deliberation. This conclusion is premised — entirely it seems — on his analysis of the patterns of argument in four judicial

50 'The Core of the Case' (note 2 above) 38.

51 For which one may read 'self-determination'.

52 Thomas Poole 'Legitimacy, Rights and Judicial Review' (2005) 25 *Oxford J of Legal Studies* 697.

53 *Ibid* 720–21.

review decisions.<sup>54</sup> Like Waldron,<sup>55</sup> he draws attention to what he sees as the cursory analysis of the merits of particular rights claims relative to the emphasis on qualitatively different phenomena such as the basis and extent of judicial authority, expertise and administrative decency. Before drawing conclusions from the judicial airtime given to different arguments, it is useful to clarify the conceptual relationship between rights and fundamental interests. An individual or minority interest that is deemed fundamental is protected, in the context of judicial review, by the attribution of a 'right' to that fundamental interest. This 'right' may or may not be sufficient to win the day against the assertion of another right or a general social interest promoted or protected by legislation. More generally in legal terminology, the word 'right' denotes a claim which a litigant is legally entitled to realise. There is thus a danger of discussing the content of judicial argument at cross purposes to the substance of what a judge is actually analysing. At times Poole appears to reduce the space he credits judges with discussing rights solely to their recognition of the pertinence of a particular rights claim.<sup>56</sup> Evidently, this has the effect of considerably underestimating the part actually played by 'basic questions of justice and morality'<sup>57</sup> in judicial review.

There are more fundamental problems with Poole's critique however. First, in common with Waldron, he assumes that the fundamental nature

54 Poole claims that these cases are drawn from 'the contemporary canon.' Ibid at 703. This is a remarkable claim given that two of the four, *R v Ministry of Defence, ex p Smith* [1996] QB 517 and *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 98 predate the Human Rights Act 1998 and consequently are about as contemporary in the context of British judicial review as pre-*Marbury v Madison* decisions are to its US counterpart.

55 'If you read what passes for "reasoning" in Supreme Court decisions, most of it is not about rights at all. It's about legal history, or precedent, or jurisdiction, or theories of interpretation or other legalisms.' 'On Judicial Review' (note 2 above).

56 For instance at 706 of Poole's article (note 53 above) we find a discussion of the Court of Appeal decision in *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 988. After describing a portion of the judgment where the relevance of the applicant's right to life is recognised, Poole characterises the rest of the judgment as dealing with 'a different question altogether, namely, what was the appropriate stance of the court in reviewing the decisions of a specialised body that operated in a fraught environment in which resources were scarce.' But Poole seems oblivious to the fact that qualifying the appropriateness of the court's stance towards review on the scarcity of health-care resources is to frame the question in the context of a rights balancing exercise, namely, how the applicant's interest in life relates to those of other health authority patients. The court's discussion of the latter question is thus inextricably linked with its analysis of the value placed on individuals' interest in life. At 723, Poole claims that the trouble with conventional conceptions of rights is that almost any decision by a public body can count as an interference with individual autonomy or dignity, 'the concept itself thus provides little or no guidance as to what should count as an unjustifiable infringement of a person's autonomy.' But the demands of human autonomy do not work in one direction alone; they can conflict with one another. Where such tension occurs — as it often does in cases of judicial review — the courts can and do conduct rights balancing analysis to reach the answer most responsive to their conception of human autonomy. The analysis of the conflict is not simply a setting off of 'rights' against different orders of concern, it is analysis of how rights ought to be set off against each other. Poole thus shows a flawed understanding of the conventional conception of human rights — that their balancing plays little or no role in determining what constitutes unjustifiable infringement of individual autonomy.

57 Ibid 714.

of certain interests can be rationalised, or at least meaningfully verbalised at some length. From this assumption, he concludes that the typical ‘brevity’ of such analysis in the cases indicates a lack of judicial interest therein.<sup>58</sup> Yet the assumption is flawed. The morally ‘fundamental’ character of a human interest cannot be rationalised or logically constructed. In this context, an attribution of fundamentality is the postulation of an axiom for argument rather than an argument in itself. Consequently, taking an attribution of fundamentality to a particular human interest much further than a declaration of the interest’s essential relationship to human dignity, autonomy etc. is not possible. I am by no means suggesting that plenty of circular reasoning and well meaning platitudes cannot be presented to accompany these determinations. Indeed such articulations may occasionally produce stirring rights rhetoric. But as they do not constitute an analytical addition to a judgment, it is unreasonable to characterise a judgment’s treatment of a rights claim as a preliminary matter as indicative of a right’s secondary relevance to the outcome.<sup>59</sup>

Second, Poole misunderstands the role played by arguments about the basis and extent of judicial authority to interfere with legislation or regulations. He cites *R v Ministry of Defence, ex p Smith*<sup>60</sup> to support his thesis that rights play only a minor role in judicial review. Poole points to the emphasis the court places on ensuring that it did not overstep its authority by declaring unlawful the Ministry’s policy that all personnel known to be engaging in homosexual activity be discharged from the armed service. He then concludes that the primary issue in the case did not relate to rights but ‘other matters.’ This theme runs throughout Poole’s argument, ‘[a] striking feature of the cases examined . . . was the central role that issues of relative authority or competence played in legal argument.’<sup>61</sup> Hence, ‘questions relating to constitutional architecture and decision making authority, not questions of goodness or rightness, form the staple diet of the judicial review process.’<sup>62</sup>

There is no doubt that judges frequently emphasise the gravity of interfering with the will of elected authority, often making this the ratio of their decision. Indeed, Poole cites the Court of Appeals’ description in *Smith* of the Ministry’s policy as ‘supported by both Houses of Parliament’ as especially relevant.<sup>63</sup> But since the only intelligible basis for the legitimacy of parliament is the manner of its composition, this concern is ultimately rooted in the value judges place on the individual’s interest in political self-determination. The views of Britain’s supreme Parliament represent the consummation of the British citizen’s interest in

58 Ibid 709.

59 Poole (note 54 above) 709.

60 [1996] QB 517.

61 Poole (note 54 above) 712.

62 Ibid 713.

63 Ibid 705.

political autonomy. The content of the individual's interest in political self-determination is defined for the British body politic by majority rule and protected by the right to elect the members of Parliament. A court's qualification of the views of Parliament arguably constitutes a judicial diminution of that moral interest. Recall that as long as a judge stays within the broad confines of positive law, philosophising on moral values such as self-determination is not something for which he may be criticised as undemocratic or politically illegitimate since it is simply a part of the job to which he was constitutionally appointed. Of course the products of judicial reasoning are themselves positive law. But this need not blind us to the fact that the judicial concern with undercutting elected authority is founded on the moral value which the courts place on the representativeness of parliament. What was actually going on in *Smith* and in equivalent passages in other cases was an effort to balance conflicting fundamental human interests — an effort which constitutes genuine human rights reasoning. Consequently, in this context at least, issues relating to the relative authority of the courts vis-à-vis the legislature are inextricably linked to questions of 'rightness or goodness' and cannot be characterised as a different order of concern.<sup>64</sup>

Poole attempts to buttress his distinction between rights issues and 'second-order considerations' through arguing that concerned as the latter are 'with the composition, maintenance and well-being of the political community. . . they cannot be reduced to serving the needs of the individual *qua* individual.'<sup>65</sup> But the composition and maintenance of a democratic political community are *premised* on the political needs of the individual *qua* individual. There would otherwise be little point in cherishing the principle of 'one person one vote' as the *sine qua non* of modern democracy. Of course, there are elements in Poole's 'second-order considerations' which cannot be reduced to rights talk, to wit, general social interests.<sup>66</sup>

In relation to a number of the cases cited, Poole draws attention to the court's acknowledgment of its lack of specialist knowledge or expertise in the subject matter of the regulation when compared with the state agency that produced it.<sup>67</sup> The expertise in question invariably lies in the agency's apparently superior ability to determine the best policies to be pursued in the relevant field for the general or national interest. There is certainly no shortage of goals and means to achieve them which

64 This is not to suggest that the courts do not occasionally engage in tactical retreat from review in particular cases to conserve their political capacity to review the legislature in the future. Such manoeuvring is rarely given an airing in the published opinions however and does not represent the kind of earnest judicial anxiety over the lawful scope of judicial review canvassed in Poole's argument.

65 Ibid 712.

66 Poole characterises democratic choices about health, education, defence etc as second-order considerations. Ibid 711–12

67 Ibid 709.

Parliament could decide would be in the general interest. When Parliament decides to introduce minimum sentencing for particular crimes, individual interests, fundamental or otherwise, could conceivably be compromised. A discussion of society's general interest in a given policy is a central part of judicial review. Few cases involving rights could be resolved without reference to the interests which Parliament is seeking to serve in qualifying, directly or indirectly, the rights in question. But it is difficult to imagine the individual rights rationale for judicial review as incompatible with extensive judicial consideration of Parliament's objectives and the relevant body's expertise in meeting them. Poole appears to be led astray through a misinterpretation of what the individual rights rationale implies. He stresses that it is essential to the rationale that in fixing the standard of scrutiny, the court addresses itself primarily to the importance of the right in question and the seriousness of the threatened incursion.<sup>68</sup> As such, judicial emphasis on, *inter alia*, the relevant state body's expertise indicates that rights considerations are not sufficiently prominent in judicial review for it to be supported by the individual rights rationale.

But fixing a standard of scrutiny is, by definition, only one part of the analysis. Having established the degree of scrutiny, the weight of the state's reasons for legislating must be considered. Few formulations of the individual rights rationale permit only minor judicial attention to the merits or necessities of the state's legislation, whatever their emphasis on conditioning the likelihood of review on the importance of the individual interest at stake. Indeed, it is no wonder that judicial talk of reaching the appropriate balance between individual rights and the general interest is so commonplace. It arises because of the evident distinction between the function of a procedure — protecting individual interests — and the data the procedure ought to take into account in order to discharge that function properly.

The difficulty of refuting the classic rationale for judicial review by isolating the judicial attention given to the general interest served by the relevant state body and its expertise in the field becomes further apparent when we consider the context in which such factors are considered. When a judgment notes the importance of a general interest,<sup>69</sup> it is certain to be a factor in its conclusion as to whether the threat to the individual interest justifies review. Likewise, when a judgment refers to relevance of individual rights or interests, they are certain to be factors in its conclusion as to whether the general interest or the means to achieve it asserted by the state should be overridden. Consequently, a court's discussion and conclusions regarding the weight of a general interest are rarely stand-alone considerations. On the contrary, such weightings can

<sup>68</sup> See for instance *ibid* 724.

<sup>69</sup> As it does by implication in giving a premium to the proposed means of achieving the general interest through, say, stressing the expertise of the relevant agency.

characteristically be understood only relative to the court's discussion and conclusions on the individual rights in question.<sup>70</sup> In light of this proximity in the treatment of individual rights and general interests during judicial review, basing one's case on the judicial airtime given to one as if it were at the expense of judicial attention the other is problematic to say the least.

Using the same flawed theory with which he interprets the operation of judicial review, Poole proposes an alternative rationale for it based on 'legitimacy' where rights and 'non-rights' issues are understood to relate the same underlying concern with ensuring decency and integrity within the exercise of government power.<sup>71</sup> However, Poole's alternative appears to be the classic individual rights rationale by another name. Any given political community's notions of decency and integrity in the exercise of government power will find expression in its theory of authority, notably by way of some notion of the unlawfulness of *ultra vires* actions. As noted above, the British theory of political authority finds its traction in its capacity to consummate the individual Briton's interest in political self-determination — a matter of 'rightness' or 'goodness'. Poole gives no indication that any other meaning represented by 'decency' and 'integrity' in the exercise of public power is not reducible to other aspects of the goodness of the state's relationship with its individuals and minorities. The poverty of legitimacy as an alternative to individual rights becomes clear in Poole's summation that:

a system that encourages claims on the basis of legitimacy is underpinned—and ultimately justified—by two concerns: an instrumental concern to encourage less fallible decision-making, and a non-instrumental concern to engender public trust in the operation of government.<sup>72</sup>

But within a democracy that is (somehow) not predicated on a notion of goodness, the worst fallibility that a public decision could possess is a lack of democratic foundation; thus leaving no room for public decision by way of judicial review.<sup>73</sup> And the goal of engendering public trust in the operation of government can only be non-instrumental if it is based on the idea that the government *should* hold the public trust, which is the same as saying that it should be accountable to an electorate, which, in turn, is the same as saying that citizens should be able to determine their political destiny within the British body politic. So, we find ourselves back where we began with a moral decision that human beings should possess certain rights. Of course, 'legitimacy' might need to recognise

70 If anything this understates the frequency of relativity in the weighting of general interests; the argument could be made the no judge is really assessing the importance of a general interest without his views on the relevant rights claim in mind.

71 Ibid 724

72 Ibid 722.

73 Except of course where it has been provided for in legislation. Positivism, however, is not the basis on which Poole makes out his alternative rationale.

more than the right to political self-determination to amount to a justification for non-ultra vires judicial review. In doing so, however, it seems unlikely that it could coherently depart from the classic rights theory it uses to postulate public trust as a non instrumental.

#### IV CONCLUSION

As is apparent, considerable scepticism is in order regarding the merits of the liberal challenge to judicial review. Certainly, a defence of the constitutionalisation of rights does not amount to a substantive justification for it. Although as the tenor this article suggests, when it comes to justifications, my own inclination is that the conventional rationale based on the protection of individual rights is the best candidate. Moreover, though the natural law or deontological case for restraining democratic majorities comes under sustained criticism for not providing a theory of authority with which to resolve disagreement on its content,<sup>74</sup> it cannot yet be entirely dismissed. Its continuing relevance is due to its potential flexibility towards theories of authority; a given natural law theory might ethically accept, or even require, participatory majoritarianism as the decisional mechanism for rights while rejecting its outcomes in the event that they violate the rest of the theory's sustenance. We simply need not assume that people have to reach agreement on a decisional mechanism that is to operate in all circumstances. A state's violation of a given theory of justice might well amount to a call to resistance or subversion of the state for its theorist and anyone persuaded to adopt his theory. If chaos or civil strife rather than polite disagreement is a potential outcome of such a theory, we might have reason to consider it undemocratic or dangerous but not necessarily an invariably worthless guide for our actions.

74 See for instance Waldron *Law and Disagreement* (note 2 above) 245.