

Rights and Politics[†]

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It is an honour to join you today in celebrating Professor Jerome Hall. Professor Hall's work was ahead of its time. I did not know him, but his independence of mind and his spirited devotion to scholarship were striking in all I heard and read. Professor Hall's fame was at its height when I was beginning my research into the philosophy of law. And his name stood out as among the most distinguished American jurisprudential scholars. It stood out for his good sense, balanced judgment, and strong-minded convictions. His *Foundations of Jurisprudence* is thoroughly resistant to fashion.¹ It is an open-minded, undogmatic, and sympathetic exploration of a variety of intellectual trends and tendencies. His work on criminal law was an outstanding attempt at a thorough examination of a major branch of the law from a systematic and theoretical perspective. It set a standard for legal scholarship way above anything else accomplished in America at the time.

I do not know much about Professor Hall's private life, but there is a story which shows him to have been uniquely fortunate. As a young man practising law, so the story goes, Hall knew the great Clarence Darrow who gave him precious advice: "Swim with the current," he said, "and do only what you find interesting." The advice was opaque and bewildering, almost fitting the oracle at Delphi. Like some of that oracle's pronouncements, it appears to be designed to fail its receivers. However much they may try, they will not be able to fulfill it. But, so the story concludes, Professor Hall promptly acted on the advice, and never looked back. He abandoned legal practice and became an academic.

Only those whom the gods love can both swim with the current and do what they find interesting. And unlike Professor Hall, as my lecture today will illustrate, I am not one who, when doing what he is interested in, finds himself swimming with the current. In fact my aim is to swim against the current, or at least against a current. The main part of my talk is a challenge to two popular fallacies, which I will call the "Universalist" and the "Individualist" Fallacies. The Universalist Fallacy leads to the false belief that all rights derive from universal, and unchanging, rights. The Individualist Fallacy leads to the false belief that all rights—or more modestly, all important rights—are justified by concern for the rightholder and his interests. Having challenged these popular beliefs, I will say something about the way they have distorted our view of politics and our view of its relation to the law.

As I said, I will be swimming against powerful currents. But as is inevitable in matters of morality, political morality included, there are no currents without crosscurrents, or even countercurrents. It is not possible to discover completely new truths about fundamental moral questions like those upon which I will be touching. Such originality would imply that it is possible for all the people to be mistaken all the time about all basic moral beliefs. To suppose that that is possible is to misunderstand the nature of

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1. JEROME HALL, *FOUNDATIONS OF JURISPRUDENCE* (1973).

morality. So the path I will be following is not of my own making, and I trust that many of you will know its contours. This is helpful inasmuch as it is impossible in one talk to do more than scratch the surface.² Inevitably my aim today is modest. I will not argue for any rights, nor for any method of protecting rights. My purpose is to help focus the way we think about rights. While the substance of the talk is a critique of the two fallacies and the theses they support, I will conclude with some comments on the way rights should be seen and on the place, if any, of politics in judicial deliberations. Rights, I shall claim, should be thought of contextually, not universally, and as, in part, providing a framework for public life. Therefore, they cannot be totally separated from ordinary politics.

I. THE UNIVERSALIST FALLACY

A popular and deeply entrenched belief has it that little rights out of big rights grow. Or, in other words, relatively more specific rights are the application of universal rights to relatively specific circumstances. I will call it the "universalist thesis."

Rights are universal if (and only if) it is possible to specify the conditions for their application (*i.e.*, who has them and when) without using any singular referring expressions (*i.e.*, without the use of proper names, demonstratives, definite descriptions, or time and space coordinates). Otherwise they are, in the terminology I am using, more or less specific.³ So my right to enter the university campus is a specific right, for it identifies its holder by reference to an individual, namely me. The right of every student of the university to enter the university campus is also specific, for the reference to a student of the university relates to a specific "thing," the university, and—by implication—also to certain authorities of it who admit students. I give these simple examples to emphasise that specific rights are not contrasted with general rights, but with universal rights. Specific rights can be general, and can enjoy various degrees of generality, for generality is a matter of degree. The right of American students of the university to vote in the election is less general than that of citizens of the United States to vote in the election, for the category of citizens of the United States is wider than that of students of the university. But both are specific rights, for the United States is also a specific "thing," a country, and the rightholders are identified through the reference to it by name.⁴

It goes without saying that many, if not all, legal rights are specific. For one thing, few legal systems claim, and none should claim, universal jurisdiction. With few exceptions (*e.g.*, some forms of international terrorism) the jurisdictional doctrines of most civilised countries limit the application of their law to people associated with them and/or to events which took place within their territory. Many other rights are confined to people who registered before certain dates, obtained permits or licenses, made agreements with

2. For a more in-depth discussion of these and related issues, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 165-263 (1986) [hereinafter RAZ, *THE MORALITY OF FREEDOM*]; JOSEPH RAZ, *Rights and Individual Well-Being*, in *ETHICS IN THE PUBLIC DOMAIN* 29-44 (1994) [hereinafter RAZ, *Rights and Individual Well-Being*].

3. These terminological distinctions are discussed and explained in R.M. HARE, *FREEDOM AND REASON* 7-50 (1963) and J.L. MACKIE, *ETHICS* 83-90 (1977).

4. For the purpose of my present discussion, I use "universal" to apply to any right the holders of which can be identified without reference to a specific item. According to this characterisation, the right of all human beings to enter the United States, should there be such a right, is a universal right, even though its object or content is to enter a specific territory. For various purposes it may be advantageous to tighten the condition and define a universal right as one which requires no reference to specific items in specifying either the rightholder or the content of the right.

others, and so on. Many nonlegal rights are similarly specific. Many rights arise out of agreements or special relations between people (*e.g.*, parents and children).

These facts notwithstanding, the universalist thesis seems compelling. First, we can put on one side all those cases in which the specificity of rights derives from jurisdictional considerations. These considerations, whatever their form—whether they limit the rights themselves, or the jurisdiction of the courts over disputes involving the rights, or over the entitlement rightholders have to pursue them in the courts—can rightly be said not to reflect the nature of the underlying rights. Rather, they arise out of considerations of the proper division of labour between different legal institutions: it is reasonable to think that legal rules and doctrines, legal rights included, are justified only if there are nonlegal considerations sufficient to justify holding them to be part of the law. It is further reasonable to sympathise with supporters of the universalist thesis in thinking that, to the extent that legal rights are restricted by jurisdictional considerations, they are justified by universal *moral* rights, plus other moral considerations (of civility between nations, of fairness to possible litigants, of assuring the correctness of judicial decisions, and others) which establish that the jurisdiction of institutions in adjudicating disputes should be delimited by geographical or personal criteria. That would show that jurisdictional considerations are consistent with the universalist thesis.⁵

To the Universalists, rights arising out of agreements or special relationships do not present a serious problem either. While all such rights are contingent on and particular to one individual or another, they all derive from general principles which establish universal rights: when I was a child I had a right against my parents to be taken care of by them. But it was an instance of a universal principle endowing all children with the right to be looked after by their parents (unless, for instance, the children were given for satisfactory adoption). My rights against the University of Oxford arise out of my contract of employment with the University. But they are merely an instance of a universal right that all employees have against all employers, for example, that the employers shall comply with the contract of employment, or that they shall obey occupational health and safety laws.

More generally, a powerful argument is liable to be invoked by defenders of the universalist thesis. Imagine that one person has a moral right which another does not possess, and that the only difference between them which explains why one has the right and the other does not is that one is the son of X, or that the other is an employee of Y, or that one was born on the first of January, or some other specific characteristic possessed by only one of them. Clearly that would be no explanation at all. If that is all the explanation there can be, then the difference between their moral rights is arbitrary. But the possession of moral rights cannot be arbitrary. I will refer to this as the “general argument” for the thesis. It purports to show that any right which neither is nor derives

5. An attenuated version of the universalist thesis holds that any right is either universal or it is the application of some universal right(s). In this form, the thesis allows that limits on the right can derive from considerations other than another's right. However, even the nonattenuated thesis is compatible with the existence of justified jurisdictional claims. My remarks in the text are to show that jurisdictional claims need not be viewed as limiting the right. They only limit the power of some institutions either to enforce it or to recognise it in some other way. I am relying on the fact that we can pierce through the official language (which in some cases may present jurisdictional claims as setting limits to the right itself) and interpret the law in ways which are morally sound. The degree to which this can be done cannot be discussed here.

Some rights may be geographically limited (*e.g.*, one may have rights to conduct oneself in certain ways in Oxford only). That is, there are such rights whose limitations are not based on jurisdictional concerns, and they can be applications of universal rights.

from a universal right is necessarily arbitrary. It is arbitrary because the difference between rightholders and those who do not have rights remains entirely unexplained and unexplainable.

To show its full strength, the universalist thesis should be elaborated and refined. Various objections to it are easily deflected. Some result from a misunderstanding of the thesis. Notice, for example, that it does not claim that we cannot know that a person, or people of a certain class, have a specific right unless we know what universal rights these specific rights instantiate. The universalist thesis is compatible with the following claims: (1) Often, or even always, we are justified in having greater confidence in our belief that a person has some specific right than in our belief that it is an instance of this or that universal right; and (2) Often we know that a person has a specific right, but we do not know of which universal right it is an instance.

All of this may well be the case, and it is entirely consistent with the universalist thesis. It is true that the thesis implies that, so long as we do not know of which universal right a specific right is an instance, we do not know the full justification of the specific right in question. But that does not mean that we need doubt its existence or refrain from protecting it. Nor does it mean that all reasoning about the existence of rights must be deductive reasoning, nor that it must proceed from the more to the less general, or from the abstract to the specific. Sometimes the best arguments about the existence of rights are analogical arguments proceeding from one specific case to another. Arguably, analogical reasoning is particularly important in the law.⁶

But I do not want to continue defending the universalist thesis. After all, my aim is to undermine it. I have spent some time defending it in order to be able to claim that, while the general argument for the thesis is based on a sound precept, that precept does not warrant accepting the thesis. The argument is fallacious. The sound precept is that (1) moral (or evaluative) differences are not arbitrary; (2) therefore, necessarily, if two cases differ in a particular moral or evaluative property there are other differences between them; and (3) to explain the difference, those further differences cannot be ones which must be expressed with the use of singular referring expressions. To explain a moral or an evaluative difference, one needs to invoke a universal property present in one case and not in the other.

So what is wrong with the argument? Why is it fallacious? The answer is simple. There is nothing in the precepts on which the argument rests to suggest that the explanation of a difference in the rights people have must depend on universal rights. The argument establishes only that moral differences must, on pain of arbitrariness, be susceptible to explanation, and that moral explanations derive from universal principles. It does not establish that these are universal principles of rights. Some may be. Others may be principles of duty, or some other universal moral considerations about the value of friendship, love, or gratitude, or any other universal moral precept.

Two ways of trying to reinforce the general argument in order to avoid my refutation can be quickly rejected. Some people believe that at its foundations there is nothing to morality except rights.⁷ If so, then my suggestion that specific rights may derive from universal principles, which themselves are not principles of rights, can be dismissed. The thought that rights and rights alone are the ultimate moral consideration is encouraged

6. For an illuminating discussion, see Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

7. I am not going to discuss here the claim that morality has foundations—a far-from-obvious claim.

by the fact that rights imply concern for the individual rightholder. Many people believe that morality is ultimately about the interests or well-being of individuals. Does it not follow that it is at bottom about rights? No, it does not. Concern for the individual expresses itself in love and friendship; it is reflected in the doctrine of virtue and in much else. But there is no right to have friends or to be loved, and none of the virtues can be understood in terms of rights. So, concern for the interests of individuals does not translate itself into principles of rights. At least it cannot be exhausted by them.

A second way of reinforcing the general argument in response to the refutation can also be readily rejected. Some people think that even if there is more to morality than rights, rights are lexically more important than any other matter of moral concern and therefore cannot be derived from other moral principles. There is no reason to accept this claim. Again, the examples of the virtues and of love and friendship seem to contradict it. And I believe that they do.

A related point concerns the relative importance of those rights which either are or derive from universal rights as against those which do not. Some people will concede that some rights are explained and justified by universal principles which are not themselves principles of rights. However, they will want to insist that universal rights are of greater importance and that they carry greater weight than any others. This view, too, is without support in any rational argument. Indeed, unless the thought can be sustained that universal principles of rights are more important than other universal moral principles and values, it is implausible to think that universal rights are necessarily or in fact more important than rights which may derive from other moral principles.

II. THE MISTAKE OF INDIVIDUALISM

So far my argument has been purely negative. I showed that the general argument for the universalist thesis is fallacious. That does not establish that the thesis is false. To do that one has to show that there are specific rights which derive from considerations other than those of other rights. So long as the argument remains negative, it remains incomplete and leaves open the possibility that some alternative reason for the universalist thesis may yet be found. So we have to move on to a closer look at the nature of rights and of the foundations of rights. When we do that we immediately encounter the second fallacy with which this talk is concerned, the Individualist Fallacy. Let me explain: *X* has a right to *Z* against *Y* if and only if his having *Z* or a right to it will protect or promote an interest of *X*, and if the case for protecting and promoting that interest of his through securing *Z* to him justifies the duty on *Y* not to interfere with *X* having *Z* or to help to secure his having it.⁸ This definition is a variant of what is known as the "interest-based approach" to rights, since it regards rights as essentially protecting interests.

Given the definition, the individualist thesis seems inescapable. It regards rights as being by their very nature a way of protecting individual interests against the interests or claims of the public or collectivity, or against whatever reasons there are to promote

8. This is an abbreviated schematic definition. To make sense it cannot be unpacked or applied mechanically but has to be adapted to individual cases. For a more extensive discussion of the concept of a right, see RAZ, *Legal Rights*, in *ETHICS IN THE PUBLIC DOMAIN*, *supra* note 2, at 238-60; RAZ, *THE MORALITY OF FREEDOM*, *supra* note 2, at 165-92. Some other chapters in these books also explore themes which I repeat and develop here.

the general good.⁹ The individualist view of rights is confrontational: Rights set the limits of the private sphere, in which each individual is sovereign over his or her own affairs, as against the public domain, where the public interest, as determined by political action, prevails. Rights protect individuals against demands that they contribute to the public good, or to the welfare of other individuals. Is not the individualist thesis, with its confrontational outlook, a logical implication of the fact that by definition only interests are protected by rights? The answer is a clear negative. To be sure, some rights do or can function in this way, and in some political cultures this function is prominent. But this does not warrant the individualist thesis, which is a thesis about the nature of rights in general. Two classes of rights provide a ready illustration of how the individualist's understanding of rights is narrow and, as a result, distorted.

First, groups as well as individuals possess rights. Group rights, the rights of nations, families, and the like, are based on the interests of these groups. Naturally, there is no intrinsic value in protecting the interests of groups. Their interests merit protection only to the extent that they serve individual interests. Whatever the ultimate justification of group rights, they are the rights of groups and not of individuals. Nor do they derive their justification from individual rights; rather, their proximate justification is in the interest of the group, and their ultimate justification lies in the service to individual interests of advancing the interest of the group.

Second, the rights of judges, of members of the legislature, and of all other legal officeholders are justified by the interest of the office. Whatever is necessary or useful for the efficient discharge of an office is in the interest of the office. But there is no intrinsic value in protecting these interests. The ultimate justification of the rights depends on the fact that in serving the interests of the officials they protect and promote the interest of the community as a whole; they protect and promote common goods.

Supporters of the individualist thesis usually dismiss these cases as marginal. It is difficult for the unblinkered to think of them as marginal given their prominence in public law, in commercial law, and in the law of obligations in general. The tendency to marginalise them is partly motivated by an empiricist and therefore individualist conception of social studies, which endorses methodological individualism, and a similar empiricist metaphysics endorsing ontological individualism. To an empiricist, corporations or officials are, if not fictions, at any rate less than completely real. They are a mere *façon de parler*, a mere figure of speech. Really, there are only people and their rights, and talking of corporations or of officials and their rights is just a convenient way of talking indirectly of people and their rights. In this way, the empiricist is an individualist, committed to the reduction of all rights to individual ones.

Empiricism is no longer unchallenged, and I need not feel guilty for my inability to tackle the distortions it brought in its wake to moral, political, and legal thought today. Nor need I rely on these examples to make my case. I mentioned them because even those who lost faith in empiricism have not always rid themselves of its mistaken consequences, and are sometimes prey to the individualist fallacy about rights.

Let me illustrate the same point through another example. The structure of all these cases is the same. All the nonindividualist examples depend on a simple fact: while every

9. The two most prominent supporters of the individualist thesis among political philosophers today, and the two who have done more than any other thinkers to propagate that way of understanding rights, are Ronald Dworkin and Robert Nozick. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 28-33 (1974).

right protects or promotes an interest of the rightholder, the reasons for protecting those interests, and therefore the justification of the rights which provide the protection, are not confined to concern for the well-being of the rightholders. We saw how this factor works in the cases of group rights and the rights of officials. It obviously applies to the rights of guardians, trustees, and so on. But it applies to many rights, possibly to all the rights which merit legal recognition and enforcement. Consider, for example, rights which are protected by the criminal law. These include property rights protected by the criminal law through the institution of offences against theft, burglary, fraud, and many others. It is commonplace that the public interest in securing a society in which respect for property prevails is taken into account in apportioning punishment for these offences. That is, the punishment reflects the public interest in securing these rights, in securing a general atmosphere of respect for them.

The reason for caring about the violation of any one person's right to property therefore transcends concern for the interest of *that* person in his property. Moreover, it transcends the interest of all property owners in their property. Every person has such an interest inasmuch as (1) every person may become a property owner; and (2) every person benefits from the fact that property rights are secure. These benefits take many forms. They are not easy to specify exhaustively. They come close to being the interest that all people have in living in a civil society. My right in my property is based on my interest in having that property. But the weight given to my interest, the degree of protection it deserves, and the form that protection should take are morally determined by considerations which transcend concern for my interest in itself. They reflect the interest of other people in the common good of respect for property.¹⁰

Some people will try to resist this conclusion by denying that the criminal law protects the rights of the victims of crime. It is true, they will say, that in general whenever a property offence is committed a right of the owner of the property involved is violated. But that does not mean that the criminal law is there to protect that right. The right is protected by whatever private law remedies the victim has. Criminal law is concerned exclusively with protecting the public against crime. The proof is that the public interest rather than the interest of the victim dominates decisions involved in the criminal process. But this response seems to be motivated by nothing other than dogma. My suggestion is that the right which protects an individual's interest is justified and shaped in part by the fact that protecting his interest is in the public interest.¹¹ The objector sustains his rejection of this suggestion by arbitrarily denying that anything to do with the public interest is relevant to the right.

It is crucial to see that the objector's response is arbitrary. He could not possibly regard the fact that crimes against property consist of the violation of property rights as coincidental. So he must divide the protection of property rights into two elements: private law protects the right itself, and criminal law protects the public interest. This division is false to the facts, and in any case fails to support his objection. It is false to the facts as both private law remedies and criminal punishments are based on the dual

10. The fact that different conditions apply to criminal and civil liability (e.g., the difference in the mens rea required for criminal and civil liability and the differences between the defence doctrines applicable in the different areas of law) is no more material to the argument of this essay than the fact that injunctions are available under different conditions than damages. Inevitably, if remedies and penalties are not to be unjust, conditions suitable to the nature of each have to be met before they become available. The fact that a defence of that kind exists does not show that the right was not infringed. It merely blocks the remedy or the punishment.

11. This interest is of the kind I call a "common good," as will be explained below. See *infra* part III.

concern for the rightholder and for the public. The existence of punitive and exemplary damages is but one small manifestation of private law's sensitivity to the public interest. The rights of victim and complainant under the criminal process is but one manifestation of the sensitivity of criminal law to the rights of victims. Tracing these crossings of concerns is a complicated task which cannot be undertaken here.

Let me turn to the fact that in any case the objector's alleged facts do not support his case. Suppose that the criminal law is concerned exclusively with public interest considerations, and private law exclusively with the interests of rightholders. That would be consistent with rights, even all rights, being based on both. It would simply indicate a division of labour according to which different branches of the law address themselves to different aspects of rights. To show that that is not so, the objector has to claim that the fact that offences against property infringe property rights is irrelevant to their justification. He has to show that, were property law to change and were the right which the conduct in question violates to be abolished, the case for criminalising that conduct as we now do would remain unaffected. I take this claim to be patently false. It follows that rights have a public interest aspect, as I claimed above.

Before leaving this part of the argument I will briefly indicate how it applies to constitutional rights. The argument is essentially the same. The practical importance of its application is, however, greater since individualist interpretations of constitutional rights have been particularly influential. We can take as our example "democratic rights"—rights like the right to vote, to stand for election, and to participate in political activities; the freedom of political association, demonstration, and assemblies; and those aspects of freedom of expression which are based on the fact that there is no democracy without free expression. I call these and their like "democratic rights" because of their justification. It is clear that they are not always identified as such in standard bills of rights. Rather, what I called democratic rights are often aspects of or parts of other constitutional rights.

I have a right to vote. I have an interest in being able to vote and the right is there to enable me to do so. But clearly its rationale is based not only on my interest. It is based on the common good of living under a democratic government. This is an interest shared by all, including those who—like young children—do not have a right to vote. It is the protection of that common good which gives special stringency to my right, a stringency it might not have enjoyed had my interest in it been the sole reason for it. Clearly the fact that the right is nonconvertible, that I cannot divest myself of it, nor commit myself for financial gain to exercise it one way or another, is based not on the fact that nothing can compensate me for the loss of the right to vote. Such paternalism is only rarely justified, and would be very dubious in this case. Rather, the nonconvertibility of the right reflects the fact that it is grounded in a common good of a distinctive kind which would be undermined were the right convertible. Hence, the interests which justify the right and which give it its shape and content are the interests of the public at large alongside the interests of the rightholder.

III. THE PUBLIC INTEREST AND THE COMMON GOOD

The individualist and the universalist theses encourage—though they do not entail—an outlook which places the protection and enforcement of rights outside politics. Different accounts are put forward in support of that conclusion. A common one is that rights being

universal cannot be subject to the vagaries of political fortunes. Moreover, rights protect the people who have them. That must mean, according to some writers, that rights protect people from being sacrificed for the sake of promoting the public interest. Promoting the public interest is the stuff of politics. Therefore, rights are outside politics. They mark the boundary beyond which individual interests cannot be sacrificed in the name of the public interest.

Rejecting the two theses removes the reasons for holding rights to be outside politics. Rights are justified in part by considerations of the public interest, and more specifically by considerations of the common good. And there are rights which change with time and which are neither mere applications of universal rights to particular circumstances nor less important or less stringent than universal rights.

At the same time, in my argument against the individualist thesis I was also arguing against a certain view of politics. The individualist thesis brings with it a confrontational view of rights. It is often associated with a confrontational view of politics in general. The preceding observations challenged the individualist thesis from time to time by invoking the common good as part of the rationale of rights. Some terminological clarification will bring out the implications of that point.

The public interest is, and is generally taken to be, a function of individual interests. So is the common good or the common interest. The common good differs, however, from the public one. The common good is a good which is in the interest of everyone in that society (though it need not benefit each one of them to the same degree). Here is an example. There is a public interest in the existence of a network of railway tracks in good repair. The interest is not merely that of railway users; many other members of the public, for example, consumers of goods transported by rail, share this interest. Yet some people may derive no benefit from this good, and quite possibly there are people whose interests are adversely affected by the maintenance of the railway networks. They may be affected by noise or air pollution, by decline in the value of their property, or in other ways, while not using the railway nor benefiting indirectly from its existence. So the judgment that the public interest is served by the existence of a railway network is based on the balance of good and evil, on a resolution of the conflicting interests of different people.

This is not so with the common good. If, for example, in a certain country the existence of a common language spoken by all its inhabitants is a common good, then (1) it serves an interest of every person; (2) it serves the same interest in the case of every person; and (3) that interest is served by the good in a noncompetitive way. Various public goods are common goods in this sense; for example, everyone benefits from unpolluted air. Everyone has a health interest which benefits from unpolluted air. The benefit is noncompetitive (one person's enjoyment is not at the expense of anyone else), and it is similar in nature for everyone (all enjoy it in the same way), since it serves the same health interest in every person's case (though people do not necessarily enjoy the benefit to the same degree).¹²

Another type of noncompetitive good is worth mentioning. Shared goods are goods whose benefit for people depends on people enjoying the good together and thereby

12. As the example illustrates, many common goods are public goods in the sense that term has in economic writings; that is, they are goods whose distribution is not subject to deliberate control, goods which no one has the power to deny to any individual (other than himself) without denying them to everyone in that society. However, I see no logical connection between the two notions.

contributing to each other's good. A simple example will illustrate the idea: A party or a dance is good (by being enjoyable) for its participants only because and to the extent that they enjoy it together. They enjoy having a good time together. While all shared goods are common goods in some group or another, they are not necessarily a common good in a society taken as a whole. As we know too well, they can contribute to setting one group against another. Yet one particularly important type of common good is the cultivation of a culture and a social ambience which make possible a variety of shared goods, that is, a variety of forms of social association of intrinsic merit. Shared goods are often neglected, although their role in modern societies deserves close study. But my remaining remarks will concern the importance of the wider category of the common good, and I will not pay shared goods special attention.

The importance, both theoretical and practical, of common goods is that they give the lie to the myth that politics is exclusively about the resolution of conflicts of interest. In part, and it is an important part, politics and political conflicts are about the provision of common goods; that is, about mobilising and coordinating the population to protect and promote interests which are common to all. But this conclusion and the case for it are complex and nuanced.

For example, it does not follow from the fact that a right serves a common interest that there is then no conflict of interests between the rightholder and others who have an interest served by the right. It is entirely possible that they also have other interests which conflict with their own interest which the right serves. If I am the owner of shares worth millions of pounds in companies which are the main contributors to air pollution, then, arguably, I not only have an interest in continued or increased air pollution, but that interest is my overall interest: it may outweigh my interest in clean air. So my interest in continued pollution conflicts with your interest in and your right (assuming you have one) to unpolluted air. By the same token, it conflicts with my own interest in, and my own right to, unpolluted air. This is no more than an instance of the general fact that, while rights protect interests of rightholders, those rightholders may also have other conflicting interests. Usually the result is that when rights do not serve the overall interest of the rightholders, they do not exercise them, or they waive them.

So the conclusion resulting from the fact that the protection of common goods is part of the justification of rights is not that rights inhabit a moral space in which conflict does not exist. They commonly embody a judgment about the way such conflicts are rightly resolved. Rather, the conclusion is that these conflicts are not between the rightholders and the rest, nor between the rightholder and the public interest. Rights and their boundaries demarcate the degree to which individual and common interests with (the protection of) which the rights under discussion are concerned are to be protected when they clash with other individual and common interests.

In some domains, politics is even further removed from conflicting interests than the considerations mentioned so far would suggest. Many goods are not independent of each other. Rather, many goods are interrelated through being embedded in more comprehensive structured goods. Take a simple example: I want to read Wood's book on Hegel's moral philosophy, for it will help me understand Hegel. I want to understand Hegel because he is a great philosopher and philosophy fascinates me. My interest in coming here and giving this talk, apparently so remote from my interest in Wood's book, is in fact but another aspect of my interest in philosophy.

In this example of the embeddedness of (many) goods, their connections may appear to depend on the structure of my interest in them, which is entirely up to me. But appearances are misleading. Philosophy has its own internal structure, and its own history. To be interested in philosophy, I have to be interested in it in the appropriate way: taking due account of its internal structure and of its history. Of course people who have a serious interest in philosophy do not have identical interests. A large latitude in emphasis is possible. But it is a limited latitude, limited by factors beyond the control of any individual. This objective structure of the subject and its history enables us to tell a genuine interest in the subject from a phony one, and also who is good at it and who is bad. The internal structure determines standards of success in the activity which guide the conduct of those engaged in it, and enable them and others to assess their progress.

What has all that to do with common goods? The interrelation of goods takes many forms, some very different from my example. In particular, the availability of certain goods is a precondition for the availability of many others. A property-respecting culture is a good, and it is a common good, common to the members of the society in which it is to be found. It is—and this is the point I want to emphasise—a precondition for all the goods which property makes possible. These include most of the economic activities we know of, but also many other features of the lifestyles familiar to us. They depend on much more than a property-respecting culture. But they will not exist without it. The dependence is so obvious that we do not often think of it. It is so pervasive and far reaching that we cannot trace accurately and exhaustively all the ways in which our lifestyles depend on the fact that we enjoy to a considerable degree the benefit of living in a more-or-less property-respecting society.

I will call goods the existence of which is a precondition for the existence of an adequate range of other goods in the society in which they exist “framing goods.” I suspect that most of the goods available to people anywhere depend on framing goods; they depend on them in the sense that they would not be within people’s reach unless those framing goods existed in their societies. Notice that I am not defining framing goods as those without which sufficient goods for human well-being will not exist. I want a concept of a type of goods which, while being the condition for the existence of a certain range of goods necessary for the well-being of people in the society in which goods of this type exist, can be replaced by other (framing) goods were they not to exist. The fact that private property is a framing good allows that there could be decent and flourishing societies without private property—societies in which only goods which do not presuppose private property exist (most of them different from goods available to us)—but that such goods could be sufficient for people’s well-being.

The notion of a framing good is still very vague. But, as I do not intend to rely on it in complex, detailed argument, this may not matter. What does matter is that the availability of an adequate range of goods in a society is a common good, and to the extent that this availability depends on framing goods, the framing goods are also common goods. Moreover, the interest of members of the society in the existence of whatever framing goods exist in their society is more fundamental than most of their other interests. Even the market, that arena of economic competition and conflicting interests, presupposes market institutions (such as enforceable contracts) which are a common good, in that they provide everyone with the opportunity to benefit directly or indirectly from the advantages which accrue to free market economies.

There are other examples of common goods regarding which conflict of interests is limited, and where political controversy is primarily controversy about which goods are common goods and how best to serve them.¹³ The extent to which we underestimate the importance of this aspect of politics may be due in part to a tendency to regard all disagreements about values as rationalisations that mask naked conflicts of interests. It may also be due to a misguided and narrow view of personal interests.

Disputes about the relation between religion and the state, or about the degree to which discrimination on the basis of sexual orientation violates people's rights, are prime examples of disputes over common goods. These are typically issues of constitutional law, though their ramifications will be felt in property law, contract law, and most other branches of the law. But do these issues concern common goods? In what way is it a common good to live in a tolerant society which does not discriminate against people on the basis of valuable aspects of their lifestyle which are central to their own sense of who they are? Is that not a matter which concerns only people who either discriminate or are discriminated against? The answer is that there are more ways in which we all benefit from living in a tolerant and nondiscriminatory society than can be discussed and illustrated here. A prejudiced and intolerant society affects adversely the options available to every one of its members. It colours the nature of the social relations each can have. It threatens to make each member complicitous with its bigotry through association with bigots, through involvement in projects which involve the display of prejudice and the practice of discrimination. It imposes duties actively to fight prejudice and discrimination in one's own society in order not to be tainted by its failures through membership in it; duties which are burdensome and limit one's ability to pursue other options. Alternatively, in order to avoid those duties one has to dissociate oneself from one's society, perhaps to emigrate. And that may leave one divided and torn.

I will not continue this list. It is clear that I am assuming that people have what one may call moral interests, as well as material, social, cultural, and other types of interests. The greatest obstacle to accepting the existence of such interests is that such acceptance makes it obvious that our interests can be adversely affected without our ever becoming aware of the fact. It assumes that one can have a life which is not worth having while being perfectly content with it. Controversial as that point may be, I am unable to defend it here. Once this point is agreed, the rest is a simple matter of exercising our moral imagination. In some ways it is more alert when we think of the failings of societies other than our own. Think of the way living in an apartheid system affects the life of all in that society. You will easily come up with more examples than I can survey here.

We are all aware that the politics of framing goods and of other common goods which serve the public interest are not free of controversy and conflicts of views. These controversies can be among those most bitterly fought in society. At the same time, we should not lose sight of the fact that no society can enjoy peaceful existence unless its members enjoy a considerable degree of agreement regarding common goods. In these days of so much talk about pluralism and multiculturalism, we tend to overlook the considerable measure of agreement on the nature and importance of common goods; an agreement that is no less secure for being often unspoken, consisting in what we so much take for granted that we do not notice it.

13. Let me interpose to clarify that I am not suggesting that politics is only about one or the other of these two. There is more to it than that.

IV. COMMON GOODS AND INDIVIDUAL RIGHTS

We are now in position to answer one objection to my main claim about rights. Individual rights protect the interest of the rightholder, and that is essential to their justification. But, I argued, the weight given to the interest of the rightholder in determining whether his interest is protected by a right, and how extensive that protection is, reflects not only our concern for the individual, but also our concern for the public interest which will be served by protecting the interest of the rightholder. One objection to this view is that it treats rightholders as means to the promotion of the public interest, rather than as ends in themselves.

The objection is misguided. It misses two vital aspects of my claim. First, rights are never justified just because they serve the public interest. They are justified because rights serve the interest of the rightholder and in doing so they also serve the common good. Far from it being the case that the interest of the rightholder is ignored or sacrificed for the common good, the fact that rights serve the common good justifies extra protection to the interest of the rightholder.

Second, to the extent that the rightholder's interest is given extra weight for reasons of the common good, these reasons are not altogether detachable from considerations of the rightholder's own interest. The common good is the good of all, including the good of the rightholder. By serving the common good, the right also serves the interest of the rightholder in that common good. There is here what I have called elsewhere a dual harmony between the interest of the rightholder and the interest of other people which is served by his right.¹⁴ The right protects the common good by protecting his interest, and it protects his interest by protecting the common good.

Another objection to my account of rights is often made by those who claim the priority of rights over the good. They reject analyses of rights in terms of interests. They understand rights as expressing principles of respect for persons. In particular they are liable to say that, since people disagree about what is of value, the principles which lie at the foundations of a political community, including those asserting various fundamental rights, should not presuppose anything about value. They should be principles of respect.

The thought that general agreement about principles of respect is more likely than agreement on value is illusory. I, for example, tend to think that we respect people by respecting their interests. I suspect that those who deny this are motivated by a limited conception of people's interests. For example, they may think that being treated in a humiliating way is not against the interest of those so treated. If I am right in my understanding of respect for people, then disputes are as likely about respect as about value. But, since both my view and a range of other conflicting views about the nature of respect are prevalent in modern societies, there is no reason to think that controversy about principles of respect is less likely than controversy about value.

The existence of controversy over certain issues may well weigh against the state forcing one controversial view on a dissenting population. Political philosophy should explore the scope of restraint based on this consideration. But it should not elevate an illusory ideal of social agreement about the principles governing a political community

14. RAZ, *Rights and Individual Well-Being*, *supra* note 2, at 38.

to the status of an absolute and fundamental requirement. Political communities are held together primarily by ties of history and culture which determine people's identifications with one group or another, and which determine people's sense of who they are. Agreement on political principles is desirable and adds to the cohesiveness of a society. It is not, however, the fundamental determinant of that cohesiveness. Therefore, the justification of the fundamental principles of a political community is to be sought in general ethical considerations, assigning only a limited role to consensus.

V. CONSTITUTIONAL RIGHTS

These observations raise the last objection to my rejection of the individualist and the universalist theses to be considered today. Does not their rejection leave inexplicable the role of constitutionally entrenched rights, rights which cannot be overridden by ordinary legislation or common law?

It is not my claim that the type of common good protected by constitutional rights in and of itself provides the justification for entrenching constitutional rights. The importance of framing goods, or of other common goods, does not mean that they are permanent, unchanging fixtures in the life of any society. On the contrary, they are quite likely to be in continuous change. A simple example brings the point home: It is a good common to all who live in a democratic society that their society is democratic. But the character of any democracy is in a state of flux. In Britain in the years since the war, the role of the prime minister, the balance of power and responsibility between the prime minister and the cabinet, between the cabinet and parliament, between local and central government, between each party's members of Parliament and the party grass roots, as well as the party organisation, all have undergone radical changes. And I have not mentioned yet the considerable transfer of sovereignty to the European Union, as well as many other changes in the nature of British democracy.

Changes in common goods may be good, bad, or indifferent. But rarely are they catastrophic, by which I mean that rarely do they threaten the existence of common goods of sufficient diversity and richness to provide members of the society with adequate opportunities. Wars, drought, corruption, discrimination, and persecution pose such a threat. The changes that common goods undergo because of social, economic, technological, or cultural changes rarely have these catastrophic effects. Hence, while the continued existence of common goods—the kind which create the framework for the opportunities available in a society—is of vital importance, the desirability of one or another actual or possible change in them, while possibly a matter of consequence, is rarely of similar importance. There is no general reason to exclude deliberation about the legal regulation of framing or other common goods from the domain of ordinary politics.

My remarks will be confined to constitutional rights which, as is the practice in common law jurisdictions, include a power in the rightholder to sue for their enforcement or for damages for their violation. We are so used to legal rights coming together with powers of enforcement (as I will refer to them) that some writers take them to be an

essential aspect of rights as such, or of legal rights.¹⁵ But outside institutional settings—whether the law, universities, sport associations, or others—any talk of enforcement is out of place. Violators may indeed incur duties to compensate their victims, and the victim will then have a right to be compensated. But the victims do not have powers of enforcement. They can have words with the violator. They can avoid his company in the future. But the same is true of most other people. So-called “strangers” (who may in fact be closer to the violator than the victim: they may be family or friends) can also have words with him or shun his company. Outside institutional settings, there is very little that resembles the right to sue and enforce compliance, restitution, or damages, which is the feature of common law rights.

Nor do legal rights always come with powers of enforcement. Many legal systems recognise what can be called declaratory rights, which do not entitle their holders to sue for their enforcement. They may be purely declaratory, or they may be enforceable by other government institutions; even in common law countries, some remedies against the violation of rights are not available to the victim, but require government intervention.

Having said all that, let me return to the problem of constitutional rights. I will confine my remarks to rights regarding which the rightholder has powers of enforcement. I will further confine myself to the “bill of rights” type of rights, such as the freedoms of expression, conscience, religion, movement, and occupation. The moral nature of constitutional rights has been the subject of such exhaustive debate that all I can do is indicate which views are consistent with my refutation of the two fallacies. Formally, the rejection of the universalist and the individualist theses is consistent with the “human rights” view of constitutional rights, the view that constitutional rights are justified to the extent that they provide efficient protection for universal human rights. After all, I did not argue that there are no universal human rights, and possibly their protection is the sole role of the bill of rights part of constitutions. But you know by now that that is not my view. Constitutional rights have too much to do both with the foundations of democracy, without which the content of freedom of expression would be completely changed, and with nondiscrimination doctrines. And I have already argued that these do not derive from universal rights.¹⁶

The problem of justifying constitutional rights is not the question of why the law should recognise or confer such rights, though this is an important question. The problem is of justifying the constitutional character of the rights, assuming that there is a good cause for their legal recognition in some form. It is the question of justifying their special status, their constitutional entrenchment which makes them superior to ordinary legislation.

The difficulty is often supposed to be that, in constitutionally entrenching these rights, one is taking them out of the reach of democratic government. What could justify this limitation on the powers of democratic government? As I mentioned, the human rights

15. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 34-35 (1983) (advancing the view that enforcement powers are essential to legal rights); see also WILLIAM G. SUMNER, *SUMNER TODAY* 154-57 (1971); CARL WELLMAN, *A THEORY OF RIGHTS* 81-107 (1985) (taking legal rights to be paradigmatic examples of rights and consequently including power of enforcement as an essential feature of all or of some central categories of rights).

16. In fact I did less than that. I merely gave reason to suggest that certain rights should be viewed as at least partly justified by reference to the doctrine of democratic government or of nondiscrimination. See *supra* part 1. I did not show that they are not also justified by reference to universal rights. Such a negative argument will take us into complex issues which cannot be explored here.

approach has a ready answer: since constitutional rights are (or should be) universal human rights, they cannot be changed by democratic processes.¹⁷

Stated like this, the answer is flawed even if one accepts that (justified) constitutional rights are all human rights, for it fails to address the real question: Assuming that governments should recognise and protect human rights and that they may not derogate from them, why should the courts, rather than parliaments, be trusted with this task? Supporters of the human rights approach are not, of course, short of attempted answers to this question. I am not denying that. The point is that once the debate is conducted in these terms, its centre of gravity has changed. It has become, as it ought to be, a debate about the distribution of power among different branches of government. The real issue to which constitutional rights give rise is of justifying the allocation of political power to various organs of government. When we think of constitutional rights we should think primarily of the role and powers of the courts versus other organs of government, not about whether the rights themselves are special. What makes them special is that it is best to let the matters they concern be settled by one organ of government rather than another, and not that they deal with immutable matters.

The fact that legal rights come with powers of enforcement turns them into sources of power. The allocation of rights is, among other things, a distribution of power, a way of empowering people and institutions, or of disempowering them. No less than allocating rights to government agencies, allocating them to individuals endows the individuals with power, which can be—again, among other things—political power. Its political character is particularly obvious when the rights in question are constitutional rights, especially if they are rights against the government. I believe that there is no possibility of a general account of the political role of constitutional rights. Different countries have different constitutional arrangements. The political significance of the constitution depends not only on the constitution, but also on the rest of the country's legal and political system, and on its political culture. But I want to point to one not unfamiliar feature which constitutional rights can have, and which I believe they do have in the United States.

Constitutional litigation, and the effects of people anticipating it, can become a second channel of political action, parallel to parliamentary politics. There are in various countries more channels of political action than these two. Strong, politically motivated trade unions, ready to take industrial action for social or political causes, may form another type of political arena. For present purposes, all that is required are a few remarks about the distinctness and importance of constitutional politics. The essentials of the case are simple.¹⁸

In the United States, we recently saw a clear example of how the same political goals can be pursued in parallel when the discrimination practised in the armed forces against gay people was coming under attack both in the courts and from the then-new Clinton administration. The case illustrates several important points. First, that often (though not always) the same objectives can be achieved through parliamentary politics or by the politics of constitutional rights. Second, the mechanism and the prospects of success in each political channel depend on very different factors. The mobilisation of public opinion in the streets and through the media with the aim of influencing Supreme Court decisions in the recent abortion cases, and the way the confirmation hearings for judicial

17. See *supra* note 16 and accompanying text.

18. I am relying here on my discussion of this point in my upcoming book *LIBERTY AND TRUST* (forthcoming).

appointments have developed in recent years, show that the difference should not be exaggerated. The failure of the Supreme Court to stand in the way of the wave of bigoted persecutions we know as McCarthyism shows that the politics of constitutional rights was never immune from the influences which shape ordinary politics. Nevertheless, even in the United States, and certainly in other countries, the politics of constitutional rights is marked by special features.

Three of them are very familiar. First, individuals whose rights were allegedly violated have the initiative in starting the legal process. In congressional politics, political processes are, of course, often initiated and controlled by interested organisations. But even so, they do, while the initiators of action in the politics of constitutional rights do not, need to mobilise support in the country at large, or among the major political organisations, or the main political pressure groups of the country. The politics of constitutional rights allows small groups easier access to the centres of power, including groups which are not part of the mainstream in society. Second, while the process is not free from unexplained decisions, characteristically it is conducted by the clash of arguments rather than through coalition-forming among powerful groups, and the outcome of litigation is meant to be justified by reference to the supposedly generally accepted principles of the constitution. Third, legal changes, once introduced by the courts, are normally less likely to alter with shifts in the climate of political opinion in the country.

All the points are a matter of degree. One particular misunderstanding of the nature of the politics of constitutional rights is to see its campaigns as aiming exclusively at winning a judicial decision supporting the propositions upheld by the campaigners. In fact, in many cases winning the support of the court is only a step on the hard road of securing one's political goals, as the court's decisions are often opposed by forces who do not shrink from subverting their implementation in any way they can, fair or foul. On the other hand, sometimes the campaigners can regard their action as successful even if they fail to obtain a decision supporting their cause. The publicity gained, the public sympathy aroused, and the implications of the decision to reject their claim may all play into the hands of the campaigners.

Much caution is needed in drawing conclusions from this list of three points. Political function is only loosely connected to formal legal structures. Not much can be said in general about the kind of issue which is suitable for treatment through constitutional politics, beyond the minimal observation that these should be matters admitting of greater stability, slower change, and of being settled by argument rather than through interest group coalitions.

Finally, I return to my first point. The politics of constitutional rights allows weak groups easier access to the centres of power; that is, groups with insufficient economic power, or with little social prestige, or groups who, because of their geographical dispersion or poor education or some other factor, find it difficult to have an impact in the coalition-building of congressional politics. Constitutional politics allows such weak groups access to the levers of power. This is not, I hope, a blue-eyed idealistic remark. I do not delude myself that a poor, ill-educated recent immigrant, or somebody similarly disadvantaged for other reasons, can find his way unaided to raise his grievances in the courts. But the cause-based groups which organise to fight their case in the arena of constitutional rights often represent people with no prospect of getting their case taken

up through the coalition-building of congressional politics.¹⁹ In that way, constitutional politics can empower people who are de facto politically disenfranchised. Of course, constitutional politics, like congressional politics, works within the limits set, vaguely and flexibly, by the country's political culture. And, of course, it is limited to issues which can be dealt with through constitutional litigation and the public opinion campaign which accompanies it. These areas differ in different countries, but they are always limited. Within these limits, constitutional politics can become a major political force.

I started the last part of my remarks by pointing out that constitutional rights should be perceived as akin—say—to the federalist provisions of federal constitutions; in other words, they should be perceived as concerned with the distribution of power among the various organs of government. I concluded by looking at the ability of constitutional rights not so much to strengthen the power of the courts as to empower the disenfranchised in society.

19. Am I not committed to saying that constitutional rights, in as much as they protect common goods, are in everyone's interests? Yes, but (1) constitutional rights may do more than just protect framing common goods; and more importantly (2) not everyone benefits equally from common goods. By and large, gay people benefit from the absence of homophobia more than nongays. And though everyone would benefit from the absence of homophobia, only the gays may have the will to try to fight it.