SPECIFYING CONSTITUTIONAL RIGHTS

THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS. Grégoire C.N. Webber.[1] Cambridge University Press. 2009. Pp. viii + 231. $95.00.

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Ours is an age of rights. The language of rights permeates moral and political discourse. What rights we have, and what it means to have them, are matters of public debate that are as familiar as they are vital. Discussions of free expression, privacy, or abortion, for example, are almost always cast in terms of the *rights* to free expression, privacy, and abortion. And it is not hard to explain, at least in part, why this is so. A political culture revolving around rights is cultivated and sustained by a constitutional democracy. There are at least two reasons for this. First, constitutions themselves give pride of place to rights. Constitutions define a political framework whose guarantees are defined as rights. Second, rights flourish in constitutional democracies because they serve as a *lingua franca*. They provide a single recognized and seemingly stable normative currency when the moral pluralism characteristic of democracies might otherwise threaten the possibility of there being any common coin whatsoever. Constitutional democracies like ours create and support a culture of rights, then, due to the twin natures and attendant pressures of constitutionalism and democracy.

This explanation of the importance of rights in a constitutional democracy, though, illuminates neither what constitutional rights themselves are nor how—to say nothing of how well—they play the role they are assigned within our political culture. Indeed, by conceiving of constitutional rights as guarantees and as a stable normative currency, the explanation can mislead. It can lend itself to a facile picture of constitutional rights that no one accepts, in which the constitutional status of

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any legislation or conduct can be determined just by invoking abstract rights. Things are not so simple. Constitutional rights may be guarantees, but not against everything; rights may also serve as a stable common currency, but the currency is not fixed and inflexible. There is no democratic constitutional regime whose practices suggest otherwise. In fact, most democratic constitutions or international charters of rights explicitly incorporate what is known as a *limitations clause* (or a set of tailored ones) that qualifies the rights there established. This is true of, for example, the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, the German Basic Law, the South African Bill of Rights, and the New Zealand Bill of Rights. The Canadian Charter is representative, guaranteeing its enumerated rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[3] The Canadian Charter and other similar fundamental legal instruments recognize rights, then, but only in tandem with a limitations clause. The rights are necessarily *subject to* whatever constraints the clause articulates. Interestingly, the United States Constitution is the exception that proves the rule, if it is an exception at all: its Bill of Rights contains no express limitations clause, and yet the Supreme Court, of course, interprets the rights contained therein to be limited in various ways, which is why even the First Amendment does not protect, say, incitements to imminent violence or child pornography. This suggests that a limitations clause simply makes explicit what is already implicit whenever rights are invoked, namely, that rights are limited in scope.

Granting that constitutional and other charter rights are typically guaranteed subject to an express limitations clause, what does it mean to say that they are so qualified and what can we learn about constitutions and constitutionalism more generally by reflecting on the ubiquity and role of limitations clauses? In *The Negotiable Constitution: On the Limitation of Rights*, Grégoire C. N. Webber offers contrarian answers to these questions with an ambitious reconceptualization of constitutions and their rights. His primary target is "the received approach" to limitations clauses, and its sins are many, according to Webber:

3. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

> It endorses an overzealous definition of rights, which results in rights-claims to everything thereby prompting almost all legislation (and State action more generally) to conflict with some right. In consequence, there are frequent, and indeed expected and unavoidable conclusions that rights have been infringed. Yet, countless rights-infringements are, as a matter of course, justified, with the result that it is now a governing assumption of the received approach that rights are not absolute and that they are generally opposed to or in competition with the public interest. The definition of a right is determined on the basis of the individual claimant's interest alone and does not take into account other rights or considerations not part of the right's purpose; these considerations are all relegated to the limitation clause analysis. . . . That analysis—considered to be primar[il]y if not exclusively a judicial undertaking—draws on a 'balancing of interests' and a requirement of 'proportionality' between the right and the limitation, which is informed by evidence and (albeit only ostensibly) political morality (p. 88).

Webber rejects the received approach, root and branch. He rejects what he believes is the false technicality of its proportionality and balancing analyses, its hyper-individualistic conception of rights, its denigration of popular legislation as inherently antagonistic to rights and concomitant worship of the judiciary, and its denial that rights are absolute. But the received approach errs most fundamentally, on his view, in its "overzealous definition of rights" (p. 88).

Its definition of rights is overzealous, at bottom, because of overreaching: according the received approach, if a constitution or charter grants a right to free expression, for example, then *everything* that counts as expression is subsumed by the right. No normative distinctions are made, at this stage, between protected and unprotected expression. The received approach thus takes the generality of the formulation of rights literally, as entailing universal application—one's right is to free expression, not to *some* free expression. This is the crux of the first of Webber's complaints about the received approach's understanding of rights. Given how capaciously the model construes rights, legislation will almost always tread upon someone's right to something, and that gives the legislative process—and democracy more broadly—a bad name. At a minimum, construing rights as the received approach does regularly forces a choice between our commitment to rights and our commitment to democracy.

Webber's second complaint about the received approach's conception of rights is closely related. He contends that its overzealous definition of rights actually robs rights of the normative force that is widely held to distinguish them. This is evident, according to Webber, in the two-stage analysis of constitutionality necessitated by the approach's all-encompassing model of rights: one determines, first, whether a right has been infringed and, only if one has been, whether the infringement is justified according to the limitations clause. It is therefore the limitations clause, taken up at the second stage of the inquiry, and not the antecedently-defined right, that does (at least the majority of) the justificatory work. Defining the right or determining what constitutes the right is, on this view, a straightforward empirical exercise of interpretation. Determining whether some conduct is covered by a right to free expression, for example, requires determining (only) whether the conduct in question counts as expression, which is just a matter of interpretive fact. Even concluding that some conduct is expression and is therefore *covered* by the right, however, entails nothing about whether that conduct is actually *protected* by the right. In distinguishing between coverage and protection in this way, Webber charges, the received approach reveals that rights themselves lack normative purchase. For whether a right actually protects anything, and does not merely cover it, is a function of the content of the independent limitations clause, not of the right itself. Webber thus indicts the received approach for underplaying the normative force of rights.

Webber's most fundamental positive thesis, in contrast, is that constitutional rights are actually constituted by their accompanying limitations clause. On the view he endorses, it makes no sense to distinguish and lexically order defining the right and assessing the justifiability of its abridgement. Instead, according to Webber, the very definition of a right draws upon those multifarious considerations that the received approach reserves to the second stage of its analysis, concerning the limitations clause. What is reserved to the second stage of analysis under the received approach, in other words, gets folded into the first stage under Webber's approach, so that one cannot define a right without knowing the right's limitations—what it does and does not protect or entitle one to. The definition of any right, in this way, incorporates the conditions of its permissible contravention.

Conceptualizing rights this way, Webber contends, addresses the two chief shortcomings of the received approach. First, if rights are defined so as not to conflict with justified limitations on them, then legislation will not, as a matter of course, be antagonistic to rights. For if legislative enactments are justified—and surely many of them are—they will necessarily *not* conflict with anyone's rights. The happy upshot is that no choice is forced between democracy and rights. Second, if rights are constituted by their limitations, then rights themselves have a normative heft that they lack under the received approach. Having a right, on this view, entails having conclusive normative protection against some treatment or a conclusive entitlement to something. Insofar as the received approach treats rights as descriptive empirical categories, it fails to do justice to the normativity or prescriptivity of rights. Webber offers a corrective to this conceptual shortcoming: to retain the normativity of constitutional rights, their very definition must incorporate their limitations, and those are (often) conveniently marked out in a limitations clause.

So conceived, the definition of constitutional rights is more open-ended than the received approach admits. The limitations clauses upon which the definition of constitutional rights depend are, after all, themselves open-ended. The Canadian Charter's limitations clause, which again allows limits on rights that "can be demonstrably justified in a free and democratic society," surely provides for a great deal of latitude in determining how to limit the rights it recognizes, even as it focuses the inquiry on the values of freedom and democracy. For the ideal of a free and democratic society is an abstract and open-textured one. This does not mean that rights cannot be misconstrued or limited in ways that are mistaken or just plain wrong. Latitude is not license. Webber makes this clear when he maintains that "the improper limitation of a right *poses a challenge to the political legitimacy of the State.*" (p. 18) Still, there is no single proper limitation. There are only values or principles, many of which are incommensurable, that must be heeded and given due regard in limiting constitutional rights. And while different extant limitations clauses may cite various legitimating considerations, Webber believes that two general principles are paramount, underlying all sound limitations clauses and thus all legitimate constitutions: "the principle of democracy" (p. 18), which emphasizes popular sovereignty, and "the principle of human rights" (p. 21), which captures those basic rights not subject to

majoritarian control.[4] Even these, however, are merely regulative principles and do not dictate any single correct limitation on constitutional rights. Discretion and judgment are unavoidable.

This prompts Webber to re-imagine constitutional rights and constitutions themselves as *negotiable*: "[t]he constitution of a democratic constitutional State, and especially constitutional rights, ought to remain open, on an on-going basis, for democratic re-negotiating" (p. 13). If constitutional rights are not static and wooden as on the received approach, but dynamic and entirely compatible with justifiable legislation as Webber argues, then a constitution and the rights it recognizes can be cast and recast as circumstances on the ground and normative commitments change. And in a democracy, Webber contends, negotiating and re-negotiating rights is the job of the legislature. Webber's is thus a form of common law constitutionalism in which the constitution is regarded as itself an "activity," but with the legislature playing the role that the common law reserves for judges. Indeed, it is Webber's view, following Jeremy Waldron and others, that "[t]he legislature alone is in a position to be both an authority constituted by the constitution as well as an authority with the political legitimacy to re-negotiate the constitution—that is, to (continue to) be a constituent authority" (p. 149). The discretion that is inescapably called for in limiting constitutional rights and in assessing those limitations is thus properly exercised by, and only by, the people's elected representatives.

Much as a court lacks plenary authority to adjudicate more than the case before it and so will not completely specify the contours of any particular right at one fell swoop, however, "the legislature . . . does not, in the normal case, take it upon itself to engage completely with the limitation of a right. It rather seeks to delimit a right by legislating certain aspects of the limitation of that right, from time to time" (p. 171). Envisioning only piecemeal legislative limitations of rights, Webber echoes Cass Sunstein and likens the constitution itself to an incompletely theorized agreement. The agreement is, however, always provisional. For "[t]he legislature is free to change, even radically, the legislative limitation of a constitutional right over

4. See also p. 182, where Webber maintains: "With the exception of the European Convention's appeal to 'necessity', the idea of justification in a free and democratic society animates the question of a right's limitation in all limitation clauses."

time, from one generation to the next, from one election to the next, even from one sitting of the legislature to the next" (p. 175). A constitution is indeed an activity, and quite possibly a constant one.

There is a good deal that is attractive in Webber's picture of constitutional rights, constitutions, and constitutionalism. Its originality lies in the way he combines existing but seemingly unrelated positions into a single multi-faceted theory. As Webber's theory is a synthesis of positions that others, including the present author,[5] have developed in greater depth, however, it cannot help but have a derivative feel in places. Webber could have advanced debate further and avoided this criticism had he endeavored to develop the constituent positions that his overall view comprises instead of just helping himself to them as if they were store bought. There was a missed opportunity here. Still, the synthesis itself is indeed novel and, I think, a real contribution to the literature on constitutional theory. In the remainder of this discussion, my primary aim is to explore how successful Webber is in applying the specified theory of rights, which I have defended in other contexts, to constitutional law. While I think Webber needs to tread more carefully in places, overall I find his account of constitutional rights appealing.

Let me begin by very briefly summarizing the theory of rights, called the specified conception of rights or specificationism, which I have defended and that Webber explicitly incorporates as the central plank of his overall platform.[6] It will be largely familiar from the above synopsis of Webber's view, which hews quite closely to my own view about rights. In contrast to what I referred to as the general conception of rights, which "first identifies the content of whatever right is at issue and only then determines what the right's normative implications are in the circumstances," I held that

5. Webber draws heavily from my work on the theory of rights, quoting from my papers at length and generally echoing many of their points in the keystone chapter, "Constituting Rights by Limitation," and citing them in twenty-three footnotes over thirty pages (pp. 116–46). Those papers are John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights*, 23 LAW & PHIL. 325 (2004); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127 (2008) [hereinafter, Oberdiek, *Specifying*]; and John Oberdiek, *What's Wrong with Infringements (Insofar as Infringements are Not Wrong): A Reply*, 27 LAW & PHIL. 293 (2008) [hereinafter, Oberdiek, *What's Wrong*].

6. I am not the first to defend this theory. The most famous invocation of it comes in Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). As it happens, Thomson later renounced her specificationism. I discuss this in Oberdiek *What's Wrong*, *supra* note 5, at 293–94.

specificationism "identifies the content of a right *in light of* and indeed *in response to* what is justifiable to do under the circumstances . . . so as not to conflict in the first place with justifiable behaviour."[7] Rights might be *stated* in general terms, on my view, but rights actually *are* specified, so that the seemingly general right not to be killed, for example, which reads as a right not to be killed *full stop*, is truly the right not to be killed *unjustly*. I supported this conclusion with arguments too involved to repeat here, but which can be gleaned from Webber's discussion—specificationism makes better sense of the way we argue towards rights and neither reifies nor renders rights redundant, for starters.

The foregoing overview underlines the striking parallel in the structures of both the received approach to constitutional rights and the general conception of rights *simpliciter*, as well as Webber's and my respective contrary positions. Both the received approach to constitutional rights and the general conception of rights analytically distinguish the question of what a right itself is from the question of what a right calls for in any particular case. Both views, in other words, hold that rights can be defined independently of their justified abridgement and both also hold that rights can be justifiably abridged. On the former view, it is primarily legislation that tests the right, and one looks to a limitations clause to see if the potentially offending legislation can, in the circumstances, be justified in the clause's terms. On the latter view, it is conduct of any kind that tests the right, and one looks to normative facts to determine whether, in the circumstances, the potentially offending conduct is compatible with the right. Webber's and my respective views, in turn, collapse these two stages: Webber maintains that constitutional rights are constituted by their limitations clause, while I contend that rights are specified so not to conflict with morally justifiable conduct.

The relationship between the received approach and Webber's view, on the one hand, and the general conception of rights and specificationism, on the other, is thus analogous. But the two antithetical pairs of views are not identical. What the two conventional views part over, and what Webber and I part over, is the standard for abridging an antecedently defined right, as the conventional views would have it, or, as Webber and I would put it, for defining the content of the right itself. The

7. Oberdiek, *Specifying*, *supra* note 5, at 128 (quoted in part by Webber at p. 131).

received approach and Webber's alternative to it appeal exclusively to a posited, if open-textured, limitations clause. The general conception of rights as well as the specificationism that I endorse look instead to normative considerations wherever and whatever they might be. This difference is due to the fact that Webber's focus is constitutional legal rights while mine is moral rights and, at one remove, common law rights. And it is that difference that gives me pause in signing on to Webber's application of specificationism to constitutional law.

The relationship between legality and morality is, of course, a source of continuing inquiry and puzzlement in general jurisprudence, and the difficulty of cleanly distinguishing between the two when rights are at issue is especially difficult. This is because moral rights are particularly legalistic. H. L. A. Hart suggests as much in maintaining, "the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules."[8] Moral rights, one might say, are law-apt. Moral rights are nevertheless distinct from legal rights, and *a fortiori* from constitutional rights, and what makes for a compelling account of moral rights does not necessarily make for as compelling an account of constitutional rights.

A distinguishing feature of specificationism, which Webber locates and finds attractive in his own account of constitutional rights, is its dynamism. A right of free expression, again for example, may protect this kind of speech but not that kind, or the same kind of speech in some circumstances but not others. The moral right of free expression (as well as every other moral right) is, in this way, entirely context-dependent. According to specificationism, unless all the considerations that are relevant to the justifiability of expressing oneself in a given way in a given context are brought to bear, the right of free expression is simply indeterminate. Ascribing to someone a right of free expression, full stop, is therefore tendentious. There are just too many ways and too many contexts in which one may *not* express oneself however one sees fit to make so sweeping a declaration. Moral rights as a class, as they are understood on the specified conception of rights, cannot be the *carte blanche* that the general conception of rights assumes them to be.

8. H. L. A. Hart, *Are There Any Natural Rights*?, 64 PHIL. REV. 175, 177 (1955).

There is much that can be said in response to these claims, to be sure, but the question I wish to pursue is whether Webber's embrace of this dynamism about constitutional rights is advisable and appropriate. An implication of specificationism's dynamism is that one argues *towards* and not *from* rights. For if rights themselves are conditional in the way that specificationism entails, then rights cannot be invoked in arguing for a normative conclusion. That would beg the question. A right is not a consideration to be factored into an all-things-considered judgment of what is permissible, according to specificationism, it rather represents the all-things-considered conclusion about permissibility. And conclusions are what we argue towards.

Of course, as a matter of actual practice, it will make a great deal of sense to appeal to rights in moral or legal argument. Rights stated in general terms are useful placeholders. When invoked this way, they purport to summarize the balance of a common subset (but only a subset) of considerations that bear on what people are ultimately entitled to do. Even if specified at some deep level, general rights can thus play a helpful heuristic role in normative argument. It would be unreasonable to expect people to start from scratch, beginning with normative primitives and working their way up, every time they actually engage in normative argument.[9] Rights conceived this way are a kind of normative shortcut. Now, Webber endorses my criticism that rights conceived generally are merely intermediate conclusions about what is permissible and are not, as under specificationism, the final conclusions that we really seek about what is ultimately permissible. If what ultimately matters are the duties that our rights actually impose, then the general conception of rights cannot be the correct theory, for the normative power of general rights is always subject to further context-specific considerations. But this philosophical vice has its virtues, and one of them is practicality, whether the rights at issue are moral or legal. So long as we all know what we are all doing in appealing to baldly stated rights that appear to lack any express qualifications, like "the right of free expression" or "the right to privacy," there is no problem. Webber need not disagree.

A different kind of pragmatic consideration, however, might seem to drive a wedge between moral and constitutional rights,

9. I make this point in Oberdiek, *Specifying*, *supra* note 5, at 133: "As a practical matter, it is of course useful to advert to rights as a way of holding constant the multifarious considerations that justify a particular right."

suggesting that specificationism is not the best account of constitutional rights, even if it is the best account of moral rights. On the best account of constitutional rights, in other words, one might in fact argue *from* them, even if one only argues *towards* specified moral rights. Although he does not distinguish between kinds of rights in the following passage, Joseph Raz captures why this might be so:

> Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties. . . . The fact that practical arguments proceed through the mediation of intermediate stages so that not every time a practical question arises does one refer to ultimate values for an answer is . . . of crucial importance in making social life possible, not only because it saves time and tediousness, but primarily because it enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values.[10]

Raz here mentions the first pragmatic consideration canvassed above, that general rights are a convenient handmaiden in practical reasoning, but it is the second that is key; namely, that rights conceived generally make social life possible in a pluralistic society precisely because they only state intermediate conclusions that prescind from their fundamental justifying values. How might this observation counsel against specifying constitutional rights?

One need not claim that politics and law are discontinuous with morality to recognize that norms governing the former domains need to be public in a way that moral norms need not be. Morality is, first and foremost, a system of norms governing individual conduct, after all, while politics and law are systems of norms governing collective and social conduct. The truth about moral rights therefore need not answer to the demands of publicity to the extent or in the way that the truth about constitutional rights must. The content of any moral right depends on belief-independent moral facts along with empirical facts about circumstances. The moral facts are the moral facts, the empirical facts are the empirical facts, and controversy or uncertainty about either is usually irrelevant. The same cannot be said of an analogous politically legitimate constitutional right. The content of any politically legitimate constitutional right surely does depend, in part, on what people generally take the

10. JOSEPH RAZ, THE MORALITY OF FREEDOM 181 (1986).

moral status of the relevant conduct to be and the relevant non-moral facts to be. Controversy is not irrelevant here. For no constitutional framework can be politically legitimate (which is not to say just or legally valid) if the norms it enshrines take no stock of the beliefs, moral or non-moral, held by the people whom the constitution purports to govern. This puts a unique pressure on constitutional rights—they are held to a standard that moral rights are not.

Raz's observation suggests that rights conceived generally, as intermediate conclusions about one's entitlements, offer a way of deflecting this pressure and meeting this additional standard because they focus attention on what we agree about—the existence of some broadly-stated right—and away from what we likely disagree about: namely, the exact implications of the right and the fundamental moral considerations that justify it. General rights, like alcohol, thus serve as a kind of social lubrication. They allow people with diverse moral outlooks to share common moral standards, even if only in the abstract, which facilitate social life because no one need either commit up front to an exhaustive set of conclusive duties or display their deepest normative commitments. They can just focus on the widely shared intermediate conclusions represented by general rights, no matter how contestably those intermediate conclusions might be applied in practice or were reached. This is the way in which general rights serve as a *lingua franca*, noted at the outset. They are like poker chips in Monte Carlo: one can purchase them with any number of diverse currencies and everyone recognizes their universal value regardless of the currency used to buy them. Raz appears to believe that this function is an important desideratum of any type of rights, but I would submit that in light of the distinctive publicity concerns canvassed above, it applies only to legal rights and especially to constitutional rights.

This, in turn, seems to entail that the received approach to constitutional rights has more going for it than Webber recognizes. Raz's observation, suitably focused on constitutional rights, suggests that there is good reason *not* to elide the distinction between the definition of a constitutional right and its limitation. Specified constitutional rights, the argument goes, would fail to take the social dimension of those rights seriously. That generally conceived constitutional rights are mere intermediate conclusions about one's entitlements and not final conclusions about them is not the shortcoming that it is in the

case of moral rights, which need not be sensitive to the demands of publicity. Quite the contrary, it is a credit to the view, counting in favor of the received approach to constitutional rights. And that seems correct. For this reason, Webber is perhaps too quick to apply specificationism to constitutional rights. The case for specificationism cannot be transposed from moral rights to constitutional rights as straightforwardly as he seems to think.

This is not to say, however, that specificationism about constitutional rights is misguided. Any credit that is due to the received approach for its doubly pragmatic conception of rights is surely defeasible. What must be shown is that the social benefit of understanding constitutional rights as intermediate conclusions is more mirage than reality. I believe that specificationism has the resources to expose the received approach on this point, so that Webber can at the end of the day rightfully adopt a specificationist account of constitutional rights. Andrei Marmor is instructive here. Discussing general constitutional rights and their intermediary role, Marmor first makes the Razian point that "[s]ocieties where different groups of people are deeply divided about their conceptions of the good, need to settle on a set of rights they can all acknowledge, in spite of deep controversies regarding the grounds of those rights (and their ramifications)."[11] Still, he argues, rights so understood represent very tenuous agreements that fall apart at crucial junctures. To determine the limitation of a right, Marmor explains, "one would naturally need to go back to the reasons for having the right in the first place, and it is precisely at this point that agreement breaks down. As a matter of fact, more often than not we will discover that there was never an agreement there to begin with."[12] It is precisely when rights must be limited or specified more precisely and duties actually imposed, then, that rights understood as consensual intermediate conclusions give out. The veil of generality and abstraction is lifted in such cases, revealing not deeper agreement about the right, but a cacophony of arguments from contentious first premises to controversial alleged duties.

The weakness of general constitutional rights on this score can be illustrated by two kinds of cases. The first, which appears

11. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 152 (2d ed. 2005), *excerpted in* ARGUING ABOUT LAW 401, 409 (Aileen Kavanagh & John Oberdiek eds., 2009).

12. *Id*.

to be the type Marmor has in mind, is one where there is indeed agreement in the abstract, but not at a foundational level. We might all agree that there is a right of free expression, for example, but not agree about the nature of its justification. Despite our disparate grounds for recognizing the right, what consensus there is enables us to apply the right in a wide range of cases, and more specifically, just so long as the differing justifications share the same implications in particular cases. But therein lies the problem. As soon as a controversy arises that commands no univocal resolution, but instead elicits different proposed dispositions reflecting the different grounds people have for recognizing the right of free expression, those contested underlying justifications move to the fore and all semblance of agreement disappears. What is left is unencumbered first-order normative argument, not *from* consensual place-holding constitutional rights, as the received approach envisions, but *towards* constitutional rights, as specificationism holds. In such a case, one cannot avoid arguing towards and specifying the constitutional right of free expression by adjudging competing conceptions of the point and value of free expression, like the Millian "marketplace of ideas" account or the non-instrumental autonomy-based one. A final if controversial disposition is required, which will likely be based on equally controversial premises. Hard cases may make bad law, but we must still settle them. Whatever settlement is made, moreover, by definition designates conclusive rights and duties, even if the settlement could not likely gain everyone's acceptance. Rights understood in this specified way remain a *lingua franca* to the extent that everyone knows what it means to have a right and to be subject to a duty, even though there may be little consensus about the content of those forms.

There is a second sort of case that counts against the received approach's embrace of general rights even more pointedly, and that is one where there never was any consensus, intermediate or otherwise, about there being a right at all. The best exemplar of such a state of affairs is the debate surrounding the constitutional right to an abortion in the United States. No one can deny that there is such a constitutional right—as a matter of positive law, it is beyond doubt—but there is nowhere near universal popular support for it. Consequently, "the right to an abortion" cannot be the placeholder that the received approach requires, facilitating inquiry into narrower questions like the potential right to a late-term abortion. Attorneys who

argue against the constitutionality of late-term abortion in court will of course address *Roe* and *Casey* in their briefs, but that recognition falls far short of the image that the received approach promotes, in which *Roe* and *Casey* state intermediate conclusions that hold our society together and from which more specific conclusions can be drawn. Constitutional norms can only hold a society together in this way if they are widely accepted, but when it comes to abortion in the United States, that wide acceptance is absent. Indeed, if attorneys arguing against the constitutionality of late-term abortion before the Supreme Court do not believe (or if their clients do not believe) that *Roe* and *Casey* were themselves correctly decided, they may just as likely attack those precedents directly as attempt to accommodate or parry them. The received approach makes no space for this kind of dissent. This is because the controversy surrounding abortion rights entails that they cannot serve as placeholders, as the received approach requires of rights. The right to an abortion, on that view, is therefore a kind of aberration—a constitutional right in name only. This is sufficient reason to reject the received approach, for despite the controversy surrounding abortion, there is nevertheless a *bona fide* constitutional right to an abortion in the United States.

It is worth adding that the received approach is not saved by the fact that the United States Supreme Court locates the constitutional right to an abortion under the more abstract rubric of privacy, support for which is far more widespread. For no one who cares about the constitutional status of abortion is fooled into thinking that a broader debate about the widely accepted right to privacy will yield agreement about the constitutionality of abortion. If anything, subsuming the constitutional right to an abortion under the right to privacy jeopardizes the consensus about that latter right's constitutional status. If privacy grounds the right to an abortion and one steadfastly believes that there should be no constitutional right to an abortion, one could argue that privacy does not deserve the protection that the Supreme Court affords it—one person's *modus ponens* is another's *modus tollens*. Going abstract in the way the received approach counsels, in short, just does not work when it comes to resolving constitutional controversies about matters that have never commanded consensus.

Specificationism can tolerate disagreement about constitutional rights in a way that the received approach cannot. This is because specificationism treats constitutional rights as

conclusive determinations of entitlements and duties. That there may be little agreement along the way towards those conclusions, or about the conclusions themselves, does not undermine the very idea of there being constitutional rights under specificationism as it clearly does under the received approach. Nothing in this argument, moreover, depends on a claim that law is in general controversial. As a general matter, no one should deny that there is widespread agreement about the law, but the above examples illustrate that there can also be deep disagreements, especially with respect to constitutional rights. What deep disagreements there are must be theoretically accommodated by an account of constitutional rights. Specificationism, but not the received approach, does this. Specificationism maintains that constitutional rights are hard-fought final, if potentially narrow, conclusions that entail duties, not intermediate conclusions of broad compass that command widespread acceptance, as the received approach holds. That latter picture fails to account for too many authentic constitutional rights.

Webber is therefore right to endorse specified constitutional rights and reject the received approach. Yet while I can ultimately join him in supporting the idea of specified constitutional rights, I cannot accept Webber's particular conception of them. In brief, and as noted above, Webber takes an unapologetically Waldronian line, holding that the legislature should be both the source and judge of any limitation on rights: the legislature both "is not only a possible, but in many respects a necessary author of a right's limitation" (p. 150), and "should be identified as the judge of the *proper* limitation against which to evaluate the legislature's limitation on a constitutional right" (p. 179). He parts with Waldron only in supporting some judicial review, albeit a very weak form, in which a legislative limitation on a constitutional right could be overruled only for a "clear mistake" (p. 209), and then only after grudgingly accepting that the practice exists, lamenting that "[w]e may regret the advent of judicial review" (p. 203). In these closing lines, my aim is simply to point out that specificationism about constitutional rights need not end up where Webber takes it, and secondarily to suggest that Webber's destination is not a place one should want to end up.

"Who decides?" is a question that always looms large in law, and any account of the limitation of constitutional rights must answer it. Webber boldly answers that it is the legislature

that ought to decide both how to limit any right initially and whether that limitation is proper upon further review. The arguments that he gives for the lofty status he accords the legislature are familiar chiefly from Waldron's work.[13] But while Webber follows Waldron in taking very seriously the so-called circumstances of politics—the fact of intractable normative disagreement—and contends that a thorough majoritarianism is the only plausible response to it, he nowhere addresses the many compelling challenges that have been put to Waldron on that score, which I will simply gesture towards. The most fundamental of these is well-stated by Aileen Kavanagh: "if disagreement about the best means of protecting rights is the ground on which we should reject the institution of judicial review, then it is difficult to see why it does not impugn participatory majoritarianism on the very same grounds."[14] The fact of normative disagreement, in short, cannot drive one to an all-encompassing majoritarianism given that it, too, fails to command anything like universal support. Nor does Webber consider Cécile Fabre's powerful objection to Waldron that putting rights against the state and its legislative whims beyond the reach of everyday democratic politics is the only way of providing the protection that is owed to the autonomous persons who ideally populate a democracy.[15] Nor does he engage with rejoinders like David Estlund's, suggesting that Waldron must value the substantive outcomes and not just the procedure of unbridled majoritarianism—what, after all, is the point of valorizing reasoned democratic debate if not that it portends better legislative conclusions?[16] Webber's refusal to address these and other criticisms—and there is a not-so-small cottage industry devoted to responding to Waldron's work on democracy—amounts, in my view, to a considerable omission. Whether adequately argued for or not, though, the question remains: does specificationism itself require that constitutional rights be limited and/or reviewed through majoritarian procedures?

13. See especially Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993), and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2005).

14. Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHIL. 451, 467 (2003).

15. See Cécile Fabre, *The Dignity of Rights*, 20 OXFORD J. LEGAL STUD. 271 (2000).

16. See DAVID ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 95–96 (2007).

In a word, no. Nor does Webber appear to disagree. While he does make claims, like the one quoted above, about a legislature being a "necessary author of a right's limitation," that necessity does not appear to be born of specificationism but rather of completely separable considerations of political legitimacy (which Webber also would have done well to defend more assiduously). Even on Webber's view, in other words, constitutional specificationism does not itself require majoritarian limitation. If we wish to isolate and assess the merits of the specified conception of constitutional rights, and if we wish to defend it, it is important not to overlook this. The theory is obviously controversial quite apart from any affiliation it may have with Waldron's emphatic commitment to majoritarian politics. That it stands against a view called "the received approach" is evidence enough of that. Even if one lacks misgivings about Waldron's views—though I admit to telegraphing some of mine in the previous paragraph—one can recognize both that a theory is easier to defend the thinner it is and that commitments like Waldron's only weigh a theory down. As an avowed partisan defending specificationism about rights, and now following Webber in defending specified constitutional rights, I want to give the theory every possible chance to convince.