reasons that could be given for policies can plausibly accord with the core values, instead of simply assessing whether the *policies themselves* uphold the values of political autonomy or equality of interests or reciprocity.

Why should we care if laws passed via democratic procedures are evaluated against the contractualist framework or against the "core values" directly? The critical issue is the interpretive scope that the two alternatives generate—and this question is particularly important insofar as the safety of democracy against internal threats ostensibly rests upon the ability to ensure that laws properly reflect the core values. On the value-theory model, an institution with the power to assess the substantive democratic pedigree of a law—almost certainly a court, though the author maintains that his theory is detachable from a defense of judicial review—need only discern whether the law accords with the three values. Under the democratic contractualist framework, however, the institution must also assess the hypothetical arguments about the compatibility of a particular law with core values that could be offered by individual citizens who hold a variety of comprehensive doctrines and who aim at universal agreement. This would require the institution to develop an extremely robust doctrine of reasonableness. Further, the institution must ensure internally that its actors *themselves* are sufficiently "empathetic" in their deliberations (p. 67). The contractualist framework thus requires *at least* a two-stage analysis—each level of which generates considerable interpretive latitude—whereas the value-theoretic account requires only a single-level judgment, with the justifiability requirement already incorporated into the core value of reciprocity.

Although Brettschneider argues that the benefit for democracy often outweighs the cost, he argues against Ronald Dworkin—to his great credit, in my view—that there is indeed a loss for democracy when a majority vote is set aside by a court on the grounds that it would harm one or more of the core values. Thus, the broader scope of judicial decision making—to determine what constitutes the core of a core value, the penumbra of reasonable disagreement about the matter, and implicitly the overarching penumbra of reasonableness in general—under the contractualist framework should give us pause. On Brettschneider's account, the court acts democratically when it protects the core values; it fails to do so when it harms these values or strikes down legislation unnecessarily. But how can we tell when a court has acted to help or to harm democracy? Must we take the court's word for it? We have little choice in the matter, insofar as Brettschneider is willing to authorize a court to strike down even constitutional amendments it deems to be at odds with the core values. If the ultimate authority to specify the contours of our core values is situated with the court rather than with the people through the exercise of the amending power, it is difficult to claim, as he does, that we have retained any real commitment to majoritarian procedures as well as to substance.

No doubt the author is right that the quality of our democracy does indeed depend upon our ability to protect these core values, but there is, and can be, no institutional barrier to self-injury; all we can do is hope that we and our agents act to preserve rather than harm democracy, and that if we or they choose wrongly, we can correct the error swiftly. Though Brettschneider has made a major contribution through his description of the substantive values that should guide our democratic decision making, only through majoritarian procedures can we preserve the capacity to determine for ourselves the legislative implications of these values. The ongoing exercise of such procedures by citizens committed to these substantive values thus constitutes our best prospect for ensuring that democracy does not consume itself.

Response to Melissa Schwartzberg's review of *Democratic Rights*

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— Corey Brettschneider

Melissa Schwartzberg intelligently raises the important question of how we might move from the ideal of the value theory democracy, to which she is sympathetic, to its institutionalization. I share the concern she voices about the extent to which democratic contractualism can be directly applied in democratic institutions, but I differ with the conclusion she draws in response to this concern.

Schwartzberg argues that democratic contractualism—my framework for interpreting the core values of political autonomy, equality of interests, and reciprocity—is too philosophically demanding to mandate institutions to use it directly. I agree; in fact, I never intended to imply that internal institutional reasoning must always directly mimic democratic contractualist reasoning. Like Jürgen Habermas, who labels theories with such an intention "mirror theories," I view such a requirement as overly demanding. Instead, I proposed that democratic contractualism, and the value theory upon which it is based, should function primarily as a standard for evaluating the degree to which existing institutions live up to the ideal of democracy. In articulating what is required by this ideal, democratic contractualism, I argued, is particularly important in refining the meaning of the general core values of democracy and suggesting why they require rights. Indeed, without this refined framework it could be argued that the core values are consistent with anti rights theories such as act utilitarianism. Understood as a way of thinking about the ideal of democracy, democratic contractualism allows for a nuanced understanding of actual institutions that exclusively procedural theories do not.

In the last chapter of *Democratic Rights,* I provide an example of this nuanced understanding. First I employ

the arguments developed earlier in the book to demonstrate why some of the Supreme Court's decisions, such as *Lochner v. New York,* have violated substantive and procedural features of democracy. However, I also point out how democratic contractualism vindicates some Court decisions that defend democratic rights in the face of legislatures that violate them. I argue that these decisions include not only protections of the right to vote but, more controversially, defenses of substantive rights, such as those of gay couples. Although I suggest why these rights would have been better affirmed by democratic majorities, in actuality they were not, and the Court defended democratic values when it protected them. Of course, to require that the Court or any institution exclusively use the language or principles of democratic self-governance that I defend in my book would be to employ a flawed mirror theory. Although there are often important intersections, legal reasoning is not political theory. However, as a standard for evaluation, the framework of democratic contractualism vindicates the Court's actions when it protects democratic rights.

Schwartzberg seems to endorse my contention that core values and substantive rights are fundamental to democratic legitimacy, but she claims that majoritarian institutions should have the exclusive power to discern and defend them. Thus, her view ultimately leads to proceduralism. On the issue of discernment, once we reject relativism about the content of democratic rights and concede that some of the specific rights I defend are fundamental, it follows that any institution can be judged in a particular case according to whether it affirms or violates rights. Schwartzberg suggests that majoritarian institutions can best defend democratic rights, but history shows that no one institution has had a monopoly on the protection or recognition of rights. Indeed, her argument would have a radical implication for democracy in the United States. It seems to require that we jettison all nonmajoritarian decision making. Such a move would throw the baby out with the bath water, denying all the important democratic protections provided by courts interpreting the Constitution over time and placing too much faith in legislatures. It would grant majoritarian institutions exclusive control over the interpretation and protection of democratic rights, shielding them from criticism on substantive democratic grounds when they violated these rights.

Democracy and Legal Change. By Melissa Schwartzberg. New York: Cambridge University Press, 2007. 240p. $85.00.
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— Corey Brettschneider, *Brown University*

This book provocatively inquires into whether some aspects of law should be regarded as beyond the purview of democratic procedures. On Melissa Schwartzberg's account, "entrenchment,"—her term for those aspects of law thought not to be susceptible to revision by democratic majorities or to constitutional amendment by supramajoritarian procedures—damages democracy, despite its prevalence in modern history. She argues that entrenchment risks sedimenting law and deadening active democratic participation because it places crucial issues beyond debate. In resisting entrenchment, she aligns herself with Jürgen Habermas's project of invigorating democratic constitutionalism as a "living project."

Schwartzberg skillfully and carefully works through a series of interesting case studies—including Athenian democracy, the appeal to reason in common law, the case of the American constitution, and the German Basic Law—to show that entrenchment of legal policies and principles has been bad for democracy. For her, ideal democracy should not be constrained, even by morally good legal principles and rules like the German Basic Law's protection of dignity or the U.S. Constitution's protection of civil liberties, such as free speech. Rather, the democratic ideal insists that a legitimate constitution must be at least potentially subject to revision. The book is a well-argued, careful piece of scholarship that uses case studies to great effect. In defining the question of entrenchment and offering her own take on the practice, Schwartzberg has produced a text that should become the standard-bearer against this practice and thus occupies a central place in the literature of democratic theory.

While Schwartzberg calls attention to some questionable cases of entrenchment, such as the German use of the principle of human dignity to prohibit abortion rights legislation, I am not convinced that she has shown that the practice is never justifiable. For instance, the case of Athens, which she praises for its "pragmatic innovation," raises the question of whether the rule of law itself should be "entrenched" in a democracy. The Athenians routinely punished offenders on an ad hoc basis without regard to any code or set of standards. Yet this Athenian practice runs counter to the near-universally accepted modern understanding that the legislature must make general law. The U.S. Constitution's requirements that the legislature act generally, such as its prohibitions on ex post facto laws and bills of attainder, are a kind of entrenchment, but they are both justifiable and necessary in an ideal democracy. The fact that these specific prohibitions are not subject to revision is a not a hindrance to democracy but a guarantee of continued democratic governance.

I also disagree with Schwartzberg's contention that American democracy should be limitless in acceptance of constitutional amendments. Consider, for instance, her discussion of whether an amendment to the Constitution could itself be unconstitutional. The author argues, contrary to scholars such as Walter Murphy, that any amendment passed according to Article V procedures would be constitutionally legitimate. She acknowledges the argument that some amendments might seem contrary