

Introduction: Symposium on Democratic Rights

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The relationship between liberalism and democracy, writes Judith Shklar, is a marriage of convenience (1998: 19). Democratic procedures are imperfect ways to protect the individual freedoms that constitute the core of liberal political morality. For Shklar, liberalism's enduring fidelity to democracy is premised on the greater dangers of alternative political systems; were representative government suspended, more fearful consequences would likely follow. The ambition of Corey Brettschneider's Democratic Rights is to defend a much closer connection between liberal rights and democracy: to violate substantive individual rights is to violate the democratic ideal itself. Brettschneider is not the first to propose a distinctively liberal understanding of democracy, but his conception is unusually ambitious in its formulation and implications. The aim of the present symposium is to examine and assess this conception as a new contribution to democratic theory. In the first section of this introduction, I provide a brief overview of Democratic Rights. In the second section, I discuss the dialectic between pure procedural and substantive accounts of democracy that drives the book's argument. In the third section, I introduce the symposium papers and the criticisms they advance.

1. Overview

Democratic Rights can be roughly divided into three parts. The first three chapters constitute the main theoretical part of the book. The next three chapters discuss the theory's implications for individual rights in three controversial policy areas: privacy, punishment, and property. The seventh and last chapter takes up the

question of judicial review in cases where political procedures do not protect the substantive rights demanded by the democratic ideal.

The theoretical framework set out in the first three chapters of the book can be summarised in three main points. First, the basic principle of Democratic Rights is an interpretation of Lincoln's dictum that democracy is a system of 'government of the people, by the people, and for the people' (Brettschneider 2007: 19-22). A benevolent elite's government of a docile underclass is not democratic, however efficient it may be in promoting their interests. Similarly, politicians who plunder a country's wealth lose their democratic credentials, no matter how often they may be re-elected.¹ The ideal of democratic self-government constrains not only the political procedures through which law is legitimately created ('government by the people'), but also the substantive ends to which it is legitimately dedicated ('government for the people'). Moreover, democracies must respect each individual's status as a ruler, that is, as a participant in a sovereign system of government of, by, and for the people (2007: 3, 19-22). Just as the idea of collective self-government includes both procedural and substantive elements, individual rulers have a dual status as both authors and addressees of law.² This means that democracies must respect the procedural rights of individuals to participate in the creation of the law and the substantive rights of individuals governed by the law.

Second, the content of the ideal of democratic self-government is provided by three core values. Equality of interests requires that no person's interests be counted as more important than any other person's (2007: 23). Political autonomy requires that individuals be regarded as free agents, capable of making their own rational decisions about public issues and the conduct of their lives (2007: 24). Reciprocity requires that public policies be justifiable to reasonable citizens in ways that they can accept (2007:

25). Brettschneider's 'value theory of democracy' claims that these core values directly support both the procedural and the substantive rights that individuals possess as authors and addressees of law (2007: 9, 19-26). These rights are co-original insofar as they are both grounded in the core values; neither kind of right is derivative of the other.

Third, Brettschneider argues that his value theory implies two democratic contractualist principles governing the justification of political coercion (2007: 54). Democracy's public reason states that permissible coercion must be premised on citizens' common status as free and equal, and not on the particular comprehensive moral doctrines that they might espouse (2007: 61-4). Positions that are inconsistent with or untrue to the three core values are excluded—utilitarianism's aggregative conception of equality is a notable example (2007: 64). The inclusion principle states that coercion must be justifiable to citizens considered as discrete individuals (2007: 64-9). More particularly, coercion must be assessed from the point of view of individual rulers who accept the three core values and who are motivated to reach agreement with their fellows (2007: 65). If such citizens could not accept a public policy, then it is not properly democratic.

The next three chapters of the book discuss the implications of the two principles of democratic contractualism for the rights of individuals in the three policy areas of privacy, punishment, and property. In chapter four, Brettschneider argues that the individuals have a democratic right to privacy and decisional autonomy. Since state intervention in consensual sexual relations cannot be justified to each reasonable citizen, it is defeated by a presumption of freedom from coercion (2007: 78-83). The US Supreme Court's decision in Lawrence v. Texas therefore represents, not the

subordination of democracy to liberal values, but the recognition of a substantive right intrinsic to the democratic ideal. In chapter five, Brettschneider argues that democratic contractualism limits the forms of punishment that can be legitimately inflicted. Criminals are not moral outlaws; as citizens, they are owed some reasonable justification for the manner in which the state punishes them (2007: 98-101). This requirement rules out capital punishment, since justification to a person cannot proceed if the person is dead; criminals therefore have a democratic right to not be executed (2007: 108-12). In chapter six, Brettschneider argues that the system of private property stands in need of justification to all excluded by ownership rights from the enjoyment of a resource. This justification must demonstrate how the reasonable basic interests of the excluded can be met in some other way (2007: 119-26). If a democratic state is to guarantee private property rights, it must therefore also guarantee welfare rights, for instance, by ensuring a right to a job or a minimum basic income (2007: 126-32).

The last chapter of Democratic Rights turns to circumstances in which democratic procedures do not fully protect the substantive rights required by the democratic ideal (2007: 136-7). In these cases, there is some significant loss of legitimacy. But it is a separate question whether anything can legitimately rectify this deficit. The fact that the core values of democracy constrain legitimate outcomes does not in itself imply that judges should be granted the power to enforce those constraints against the majority. Brettschneider believes that the institution of judicial review can be justified, but that judges must weigh the gain to democracy in upholding a substantive right against the loss to democracy in overriding a majoritarian decision (2007: 138). Not every substantive democratic right is appropriately enforced by judges; welfare rights are a plausible example (2007: 148-9). Some balance must be

struck between the competing demands of government by the people and government for the people so that the democratic ideal as a whole is minimally compromised.

2. Procedure and Substance

The basic principle of Democratic Rights, I have suggested, is the view that procedural and substantive concerns are both intrinsic to democratic self-government, and that neither concern can be reduced to the other. Brettschneider distinguishes his view from epistemic theories, which defend democratic procedures insofar as they tend to issue in decisions that reflect substantive truths about what ought to be done politically (2007: 18-9). (Such theories, he argues, very often involve an improper appeal to a comprehensive conception of truth, and have difficulty explaining why democratic procedures should be subordinated to this sectarian value.) But the core dialectic of the book is that between substantive and pure procedural theories of democracy. The latter reject the third component of Lincoln's dictum—democracy is a system of government of the people and by the people, to be sure, but for whatever purpose the people see fit to elect. Different policy ends may have different substantive moral merits, but none is inherently more democratic than another.

The full weight of Brettschneider's account of the democratic ideal thus rests on his rejection of proceduralism. His argument to this end comprises two main steps, presented in the first two chapters. In chapter one, Brettschneider notes that proceduralism implicitly presupposes some prior set of values that justify democratic processes. Political procedures cannot rest on their reflexive affirmation by citizens in actual democratic politics, since citizens may not actually affirm them (2007: 14-5). Whichever values justify decision-making procedures function, we can say, as the

underlying values of democracy. But these underlying values can come into conflict with the outcome of the procedures they justify. Suppose the rationale for majority rule is that it allows as many people as possible to participate in politics. A majority decision to disenfranchise a minority would be in conflict with this rationale (2007: 12-3). This suggests that some possible outcomes are inherently less democratic than others; not just any decision made in a legitimate democratic procedure is a legitimate democratic outcome.

The second step of the argument, presented mainly in chapter two, examines the content of the underlying values and hence of the constraints they place on legitimate outcomes. On Brettschneider's view, there is no compelling in-principle reason why these must only be procedural values. To simply stipulate that they are would be a quite arbitrary restriction on their content. Consider a quasi-pure form of proceduralism that accepts that some outcomes are less democratic than others, but only insofar as they violate the preconditions of a legitimate democratic procedure (2007: 13-4). Majority decisions to disenfranchise minorities, exile opponents, or censor public deliberation are undemocratic, on this view, solely because they violate the rights of citizens as authors of the law. This precondition theory is not altogether implausible, but its prioritisation of procedural concerns must be defended. This defence, Brettschneider believes, is not forthcoming. He advances two main arguments against the view. First, it fails to capture all the rights required by democracy. Brettschneider imagines an elected representative, Larry Legislator, who is confined to a cell for the duration of his term but is nevertheless unhindered in his ability to participate electronically in legislative debates (2007: 31-2). Larry has a democratic right to be freed, but not for any obviously procedural reason. Second, the procedural precondition theory fails to

justify the rights it does capture in a sufficiently robust way. Brettschneider uses the examples of the rights associated with the rule of law (2007: 38-44) and the right to free speech (2007: 44-51). These paradigmatic democratic rights are essential for individual rulers, not simply as authors of the law, but also as its addressees.

In contrast, Brettschneider argues that the three core values of his alternative value theory can adequately justify Larry Legislator's right against arbitrary confinement and the paradigmatic rights to the rule of law and free speech. This means that there is good reason to believe that equality of interests, political autonomy, and reciprocity function as the underlying values of democracy. But, if so, then whatever other rights they justify must also be intrinsic to the democratic ideal. Since we must invoke the three core values to account for paradigmatic democratic rights, we must follow their implications (via democratic contractualism) across the full range of policy issues. Brettschneider's ambition, then, is to demonstrate just how powerful the core values of democracy are, and just how far towards familiar liberal positions the ideal of democratic self-government itself impels us.

3. Symposium Contributions

The questions raised by Democratic Rights include whether the value theory of democracy is superior to proceduralist conceptions; whether the principles of democratic contractualism provide the right framework for assessing political coercion; and whether Brettschneider has successfully argued for specific positions, such as the abolition of capital punishment and a balanced form of judicial review. The six contributions to the symposium address various aspects of these and other questions.

Anna Stilz raises two objections to Brettschneider's theory. The first objection concerns his criticism of Jürgen Habermas (1996) as an advocate of a procedural precondition theory (2007: 15-7, 28-36). On Stilz's interpretation, Habermas and Brettschneider are committed to a similar form of co-originality in which substantive and procedural rights are equally constitutive of democracy. Stilz's second objection concerns whether substantive liberal rights are actually grounded in the democratic ideal, or in an independent ideal of legitimate state coercion. If the latter, then there may be nothing specifically undemocratic about their violation, and Brettschneider's linkage of democracy and liberal rights will be stymied. Stilz considers two ways in which the close connection between democracy and liberal legitimacy could be retained, but argues that each strategy requires prioritising either citizens' status as authors of the law or their status as its addressees. This threatens Brettschneider's conception of the co-originality of substantive and procedural rights.

Eric Beerbohm offers a defence of proceduralist theories of democracy against Brettschneider's criticisms, and raises some concerns about his expansion of the democratic ideal. First, Beerbohm argues that proceduralists can accept that the underlying values of democracy are in part substantive. Proceduralists may value the democratic process—as realised in practice, and not as an abstract system of rules—because it directly constitutes a (substantively valuable) relationship of non-mastery and mutual recognition between citizens. It does not follow that they are committed to regarding particular decisions that impair these relationships as illegitimate. Moreover, proceduralists have the resources to explain why Larry Legislator's incarceration impedes the democratic process. Second, Beerbohm suggests that democratic contractualism may incorporate too much substantive content. The risks here are that

the ideal of democratic self-government becomes indistinguishable from Scanlonian moral contractualism and that the various tensions between substantive and procedural concerns in democratic practice are obscured.

Loren King's contribution focuses on the implications of democratic contractualism for the individual rights to privacy and decisional autonomy. He notes that Brettschneider's democratic contractualism rests on the same idea of reasonableness that animates John Rawls's (2005) political liberalism. Although King is sympathetic to political liberalism, he claims that Democratic Rights does not add to the defence of the Rawlsian criterion of reciprocity in public justification against its critics. Moreover, democratic contractualism's political liberal approach to state intervention in the private realm has two related limitations. First, the appropriate scope of permissible state action seems to be determined by the need for informed choice within relationships and for feasible opportunities for exit from them. Neither of these two considerations of personal autonomy presupposes the political liberal standard of reasonableness. Second, King argues that democratic contractualism's reliance on a conception of personal autonomy indicates that it is much closer to liberal perfectionism than Brettschneider believes.

James Wilson notes that many democratic theorists suppose that liberal individual rights should ideally be protected, even if they do not incorporate these rights within the ideal of democratic self-government. He argues that what distinguishes Brettschneider's theory is not its more expansive conception of democracy as such, but rather how its reconciliation of democracy and rights is grounded in the three core values. Wilson claims, however, that this restriction of the theory to narrowly political values is a shortcoming. To illustrate this point, he argues

that Brettschneider's reciprocity-based case against capital punishment is unsuccessful: the fact that the condemned criminal dies does not in itself mean that his execution cannot be justified to him beforehand. The moral assessment of capital punishment should instead draw on considerations and values associated with individuals' status as human persons, beyond those narrowly associated with their political status as rulers.

Alex Zakaras objects both to the inclusion of substantive rights within the idea of democracy and to democratic contractualism as an account of legitimate coercion. First, he argues that Brettschneider only demonstrates that pure procedural theories of legitimacy are flawed. Proceduralists about democracy—even those who reject counter-majoritarian institutions—can accept that there are substantive limits on legitimate political outcomes; democracy and legitimacy are not co-extensive. Second, Zakaras argues that democratic contractualism's substantive constraints are far too restrictive. The value of democracy lies in how it allows citizens, with their diverse range of opinions, to decide political questions through a procedure in which they have an equal say. It does not lie in the approximation of politics to a political liberal ideal of reasonableness that few citizens may find compelling. Indeed, democratic contractualism's exclusion of reputable political theories (such as utilitarianism) as unreasonable involves a kind of disrespect for their proponents.

Alon Harel raises two objections to Brettschneider's account of judicial review. First, he argues that there is no moral loss to democracy when judges defend individual rights against majoritarian intrusion. The public has no morally significant interest in deciding questions that individuals have the right to decide for themselves. This means that judges should not balance the value of respecting majoritarian democratic procedures with the value of respecting substantive individual rights, as Brettschneider

supposes; if the right exists, then the public has simply exceeded its authority and no deference is warranted. Second, Harel claims that Brettschneider provides no compelling reason why the institution of judicial review is more likely to generate decisions that respect individual rights than majoritarian procedures. Although there would be no moral loss to democracy if judges were to uphold individual rights against majoritarian encroachment, it is a quite separate question whether they should have the institutional power to do so. Harel contrasts Brettschneider's instrumental defence of judicial review with a non-instrumental approach premised on an individual right to air grievances in a court or court-like forum.

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NOTES

- ¹ This particular example is mine. Brettschneider uses an example in which the American colonists receive equal representation at Westminster but have their interests neglected by the British majority (2007: 21-2).
- ² The term 'ruler' may suggest the more active process of creating and controlling the law (i.e., ruling), rather than the more passive experience of being subject to the law (i.e., being ruled). Since Brettschneider's concern is to emphasise individuals' dual status as authors and addressees of law, this suggestion would be unfortunate. An alternative term could be the somewhat ambiguous 'member of the public'. The public is sovereign in a

democracy, so citizens exercise political power as constituent members of that public body. But not every person commonly regarded as a member of the public is a citizen with full rights to political participation.

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